

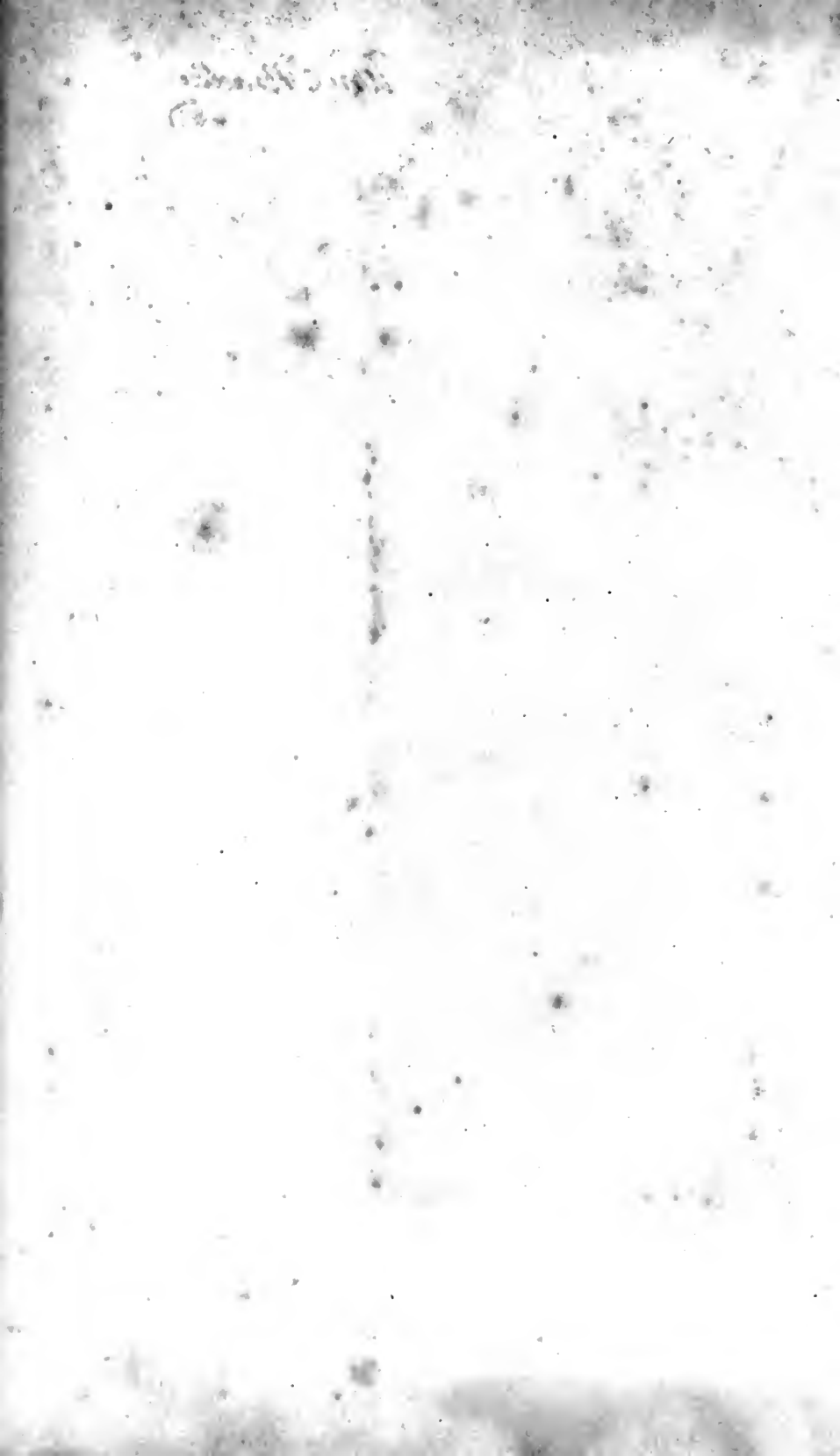
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A
PRACTICAL TREATISE
ON THE
SETTLING OF EVIDENCE
FOR
TRIALS AT NISI PRIUS;

AND ON THE

Preparing and Arranging the Necessary Proofs.

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INTRODUCTION.

I AM induced to offer the following Work to the Profession, from having often had occasion to observe, in the course of not inconsiderable experience, the defective manner in which Causes are got up for Trial. This has always appeared to me to proceed from the want of some Treatise, containing rules of practical application as to settling the Evidence, and in pointing out and arranging the proofs which are required, in all cases which occur at Nisi Prius.

The utility of such a Treatise will not be questioned, when it is considered, that it is in vain, that an Action is commenced upon grounds of Law the most settled and decided, and the Pleadings framed with consummate accuracy and knowledge ; if, when the Issue is made up, the Evidence is found to be defective, and the proofs at the Trial unequal to the support of it. Who, in practice at the Bar, has not often, under such circumstances, experienced defeat ; in Causes too, where the verdict has been lost, for want of bringing forward Evidence of easy attainment, the necessity of which was only required to be known ? Where there is an absence of all legal Evidence, success cannot be expected, however well grounded the Action may be in principle : but where such Evidence is to be had, it is just matter of reproach either to the Pleader who had not pointed it out, or to the Solicitor, who, in

preparing the Cause for Trial, had not brought it forward when within his power to do so, and which, if it had been, would have incurred success.

From what causes this defect proceeds, it is not difficult to see ; it is from not attending to the Issue to be tried, and from not knowing, what in every Case is required to be proved : if that is once known to the Solicitor, to whom the task of collecting and arranging the Evidence belongs ; he will be enabled to judge whether his proofs are sufficient to support his Case ; if they are not, he will stop the Cause in time, and not bring it forward to certain failure : to the reproach of his own professional character, and to the injury, perhaps ruin, of his Client.

To settle Evidence with accuracy is, in many cases, a task of considerable difficulty : the Pleader will have often not only to decide, on what Evidence is necessary, but also whether what he is possessed of, is legal and admissible. It is his duty too, in most instances, not only to point out what will support his own Case ; but, judging by anticipation of that which is to be set up by the other side, to be prepared to meet it. And though Solicitors, living in London, may have recourse with ease, to such aid and benefit by its assistance, it is more worthy of professional character to be able to do it themselves. But to that part of the Profession who, living at a distance, are often forced to rely on their own judgments, when called upon to prepare Causes for Trial at the Assizes : to furnish them with the means of preparing their own Proofs, on the spot, without having recourse to the assistance or advice of others, must be an object of not inconsiderable importance ; it must too be recollected, that such assist-

ance cannot be had, without adding something to the expence of a Cause, and which it often happens the Client is little able to bear.

That is the object which this Work proposes to attain. It must not be considered as an elementary Treatise upon Evidence—that has been effected by the masterly Work of Mr. Phillips, which should be found on the shelf of every Lawyer; nor upon the general Law of Nisi Prius—that has been already done by Mr. Selwyn and myself. In the arrangement I have, I confess, used my own Work, “The Digest of the Law of Nisi Prius,” as to the order and arrangement which I have adopted, and to which, for the general Law on each subject which I have treated of, I refer. I offer this to the Profession, as a practical Treatise only, on a most important part of the Law, and as a Book of general reference to be used by those in Practice, in settling and arranging Evidence in almost every case which can occur at Trials at Nisi Prius. Some Elementary Points must necessarily arise and be referred to; for these the authorities are given; but it must not be expected, that Authorities will be quoted, for every Position or Rule which I lay down to direct the Practiser in settling his Evidence for Trial. The greatest part of the Work, is the result of long Practice and experience; and the information which it contains, derived from observations suggested during that period, while I was engaged in reporting Cases at Nisi Prius, and in daily practice at the Bar.

Of its utility, I feel no doubt: of its execution, very many. It is a wide field, and required much labour of reference, and diligence in compiling. These I have not

spared : whether the object which they aimed at has been attained, it is for others to decide.

In the arrangement of the subject, I have, first taken a general view of it, and laid down some Rules of General Practice applying to all Cases of Evidence at Nisi Prius; secondly, the Evidence applicable to particular Actions.

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 ERRATA.

Page 148, line 20, for "ante 160," read "ante, 137."

A
PRACTICAL TREATISE
ON THE
SETTLING OF EVIDENCE
FOR
TRIALS AT NISI PRIUS.

CHAPTER I.

IN settling Evidence for the Trials of Actions at Nisi Prius, the principles on which it is founded are first to be considered : for that purpose the first point to be looked at is the Issue, as joined in the cause, and the affirmative, or negative, averments which it contains. Affirmative averments are those only required to be proved. Issue may be joined in any stage of the proceedings ; on the Plea, Replication, Rejoinder, or any other part of the pleading : and an Issue is joined, when the last pleading denies all, or part of the facts pleaded in the preceding one ; whereby the case is reduced to direct affirmation or negation.

The general Issue puts the whole of the Declaration in evidence, and makes it necessary for the Plaintiff to prove every material fact averred in it : in that case Issue is

joined on the Plea by the Replication. But if the Defendant pleads, not the General Issue, but a Special Plea, consisting of one or several facts, and the Replication takes Issue on it, it is either on the whole of the Plea, or on some particular fact, or facts, averred in it. When that is done, if the Replication takes Issue upon all the facts in the Defendant's Plea, it puts the Defendant upon proof of the whole of the Plea, and of all the facts contained in it. If the Replication denies any particular fact mentioned in the Plea, Issue is joined on that, and the evidence is confined to that point only.

For example :—If the Plaintiff declares that the Defendant is indebted to him on his promissory-note, and the Defendant pleads the General Issue *non-assumpsit*, the Plaintiff must prove his Declaration, by proving the Defendant's hand-writing to the note. If the Defendant pleads, that when the note became due, " he tendered and offered to pay the amount," and the Replication denies the Tender, Issue is joined on it ; which is, by the Plaintiff saying in his Replication, " that the Defendant did not tender the money, or any part of it : " in that case the Defendant, by not denying in his plea that he had made the note, admits it, and rests his defence on the Tender. It is an affirmative averment on his part that he did so, and the whole evidence lies on him. But, if to the Tender the Plaintiff had replied, " A subsequent demand of payment of the note, made on the Defendant, and a refusal by him to pay," on which Issue was joined ; in that case, the Plaintiff admits the Tender, and the Defendant is not called upon to prove it ; but the whole evidence rests on the Plaintiff to prove the subsequent demand and refusal.

This will exemplify all parallel cases, and it will be seen how to regulate the evidence by attending to the Issue; for, where there is no General Issue pleaded, the Defendant admits that the Plaintiff had a cause of action, and rests his defence, not on a denial that the Plaintiff had some cause of action, but on this; that he, the Defendant, has defeated it by some collateral matter. As if the Plaintiff declared in Assumpsit, on a debt due to him by the Defendant, and the Defendant pleads the Statute of Limitations only, "That he did not undertake or promise within six years." He thereby admits that he did owe the debt at one time; but that it is extinct, by the Plaintiff having suffered six years to elapse, leaving it unsued for. So, if the Defendant was to plead Accord and Satisfaction only, "that he delivered a horse, *e. g.* to the Defendant, which the Plaintiff had accepted in discharge of his debt; if the Plaintiff takes Issue on, and denies the acceptance or delivery of such thing, in satisfaction of his demand; the Defendant admits that the Plaintiff had once a cause of action, but he discharges it by such collateral matter, the delivery of something to him, which he has accepted in lieu of his debt. He is, therefore, bound to prove what he affirms; the delivery and acceptance on the terms he has stated.

It rarely, however, happens that the Defendant rests solely on such Pleas, but pleads the General Issue also, except in the case of a tender; which then puts the Plaintiff upon proof of his cause of action, as stated in the Declaration.

When, therefore, the Issue is joined on the whole Declaration, by a plea of the General Issue, the Declaration

must be taken up as consisting of so many parts as there are averments in it; and each must be proved in its order.

Thus for example; by reference to a Declaration in an Action for an Escape, which will be found at length in Chitty on Pleading, Vol. II. page 185, 3d Edit. the following averments will be found:—

The first averment is, “That the Plaintiff had recovered a Judgment against one E. F., for a certain sum :” that must be proved.

The next averment is, “That the Plaintiff sued out a writ of *ca. sa.*, directed to the Sheriff of ———; and that it was delivered to the Sheriff to be executed :” this must be proved.

The next averment is, “That the Sheriff, by virtue of that writ, arrested E. F. :” the fact of the arrest must be proved.

The last is, “That the Sheriff permitted him to escape :” that must also be proved, by giving evidence of E. F. having been seen at large after he had been arrested, as before.

This is put in general terms : the mode of proving each of these averments will be given in its proper place.

But though it is stated generally that all affirmative averments are necessary to be proved, and though the Plaintiff and Defendant are equally bound to prove such averments

in their respective Pleadings, there are some, though of that description, which are deemed immaterial; that is, which do not affect the grounds of the Action or defence, and which, for that reason, need not be proved.

Thus, the *day* laid in the Declaration is, in all cases, immaterial; except in the action of Ejectment; on Penal Statutes; or where it makes part of the contract on which the Action is brought: such as in Actions on bonds, or written instruments, as bills of exchange, notes or the like; for in these the date identifies the contract, and makes part of it. Thus, a Declaration on a Bond, dated on the 1st of January, and so described in the Declaration, would not be proved by the production of a Bond, dated the 10th, for they would appear to be different Instruments. But, if the Declaration stated a contract for the sale of goods, as made on the first of January, and unpaid for, and the evidence was that the contract was on the 10th; the time of making the contract, is of no importance; it is the breach of promise, in not paying for them, which is the ground of action; and, therefore, the averment of the particular day is considered immaterial. In those latter cases, therefore, it is sufficient for the Plaintiff to prove his cause of action on any day before commencement of the action, though it differ, from that laid in the Declaration.

The place is also, in transitory actions, immaterial; for the legal principle is that, *Actio personalis sequitur personam*. Debt is a debt every where, and there is no locality belonging to it; but to an Action that concerns the land, there is: therefore, where in Trespass *quare clausum fregit*, or in Ejectment, the Declaration lays the fact in a wrong County or Parish, it is fatal. In all

cases, therefore, of this description, the Plaintiff should be prepared with evidence of the right description of the place in that respect. (a)

Wherever, therefore, in local actions, the place is material, and is improperly laid in the Declaration, the Defendant should be prepared to prove the true place, and the Plaintiff would be nonsuited. Therefore, when this occurs, it will be prudent, in advising on the evidence in any action, to look to title Venue, in the books of Abridgment or Practice; and, if the Venue is improperly laid, the Defendant, by disproving it, entitles himself to a nonsuit.

As for example: where the Stat. 31 Eliz. chap. 5. sect. 2., and 21 Jac. I. chap. 4., direct that all actions on Penal Statutes, by common Informers, shall be brought in the proper County, if the Defendant brings evidence that the offence was committed in a different County from that laid in the declaration, the Plaintiff must be nonsuited.

Having now stated what are the principles on which Evidence is to be settled for Trials at Nisi Prius, I shall first lay down a few general Rules to be applied in practice in all cases; and secondly, the Rules to be observed in settling the Evidence in each Action separately.

(a) Cases of action against constables or officers is an exception to this; but those actions are made local by Statute 21 Jac. I. chap. 12. sect. 2.

FIRST OF THE GENERAL RULES AS TO SETTLING EVIDENCE FOR TRIALS AT NISI PRIUS TO BE OBSERVED IN PRACTICE.

I.—Every written Instrument to which there is a subscribing witness, can only be given in evidence by calling the subscribing witness to prove it: he must, therefore, in every instance, be subpoenaed. And this is not dispensed with, though the Instrument is in the hands of the opposite party, and the name of the subscribing witness unknown. In such a case, a copy must be obtained under a Judge's order, of the name and abode of the subscribing witness; and he must be had if possible.

(The exceptions to this rule will be found in the chapter of Debt.)

II.—Service of all Papers in the course of a cause, as Notices, Summonses, and the like, at the Party's, or his Attorney's, dwelling-house, or usual residence, is good service. Personal service is only required when an Attachment is to be grounded upon it; but no service is good, if made on a Sunday. All Papers, however, connected with the cause should, after appearance, be regularly served on the Attorney in the cause: such as the notices to set-off; to produce Papers or Notices which is necessary, in order to make copies of them evidence; and under the Stat. 49 Geo. III. of contesting a Bankruptcy.

III.—Evidence of a party's hand-writing, usually, is proved by the testimony of witnesses who have seen the party write, and are acquainted with his character of writing. The witness is not called upon to swear positively, that the paper produced *is* the hand-writing of the party; but only that he believes it to be so. But a hand-writing may be proved by a witness who never saw the party write, but who has corresponded with him; but this evidence is admissible only where the correspondence has been acted under: as for example, where a person, whose hand-writing is to be proved, has ordered goods which have been sent to him pursuant to his order, and he has paid for them: but comparison of hands is not allowable. (*b*)

IV.—When any Paper, or written Instrument, is in the hands of a Party in a Cause, which the other may have occasion to call for and use as evidence; or for any purpose, notice must be given to produce it; if not produced, the Party who gave the notice may, on proof of the notice given, and that there was such Paper or written Instrument in the opposite party's possession, give evidence of it by a copy, or by parol. But if a copy is offered in evidence, it must be proved to be so. The notice should properly state, specifically, the Paper or Instrument required.

V.—Of every thing which is matter of Record, an examined copy is evidence at *Nisi Prius*; as of a Judgment, a private Act of Parliament, and the like. So of Books of a public nature; and which, if produced, would be

(*b*) Vide 1 Esp. Dig. N. P. 176.

of themselves evidence, examined copies will be evidence: such as the Bank books; books of the East India Company; the Journals of the House of Commons; the Council-book in the Secretary of State's office, and the like. (c)

VI.—The evidence must correspond with the Issue in every point, or the Plaintiff will be nonsuited. (d) As if the Issue be on the warranty of a horse, "That he was steady in harness," and the evidence be, that he was warranted "sound," that would not support the Declaration. If the action be "Assumpsit for goods sold and delivered," and the evidence prove the demand to be for "money lent," the Plaintiff would fail in his Action.

VII.—In many cases *Notice of Action* is required to be given; and no Action can be commenced until the expiration of the time mentioned in it. This is principally in the case of Actions, against Public Officers; as Justices of the peace, Constables, Officers of the Excise, &c.

Where the Statute requires such notice, the Plaintiff must, at *Nisi Prius*, be always prepared to prove it; and he should also have the Writ ready to produce, to show the regular commencement of the Action; and that it was sued out after the time required by the Statute was expired.

This is done by calling the witness who served the notice on the Defendant, and by his production of a copy of it. He should also be prepared to prove the actual day

(c) Phillips on Evid. 338.

(d) Vid. 2 Esp. Dig. N. P. 172.

on which he served it. Every Attorney keeps, of course, a copy of all notices which he serves: if there were two copies of such notice of Action made out by him at the same time, one of which he has had served; and the other he has kept; it will be sufficient for the witness to produce the latter; provided he had compared it with the one he had served, and swears to the service. (*e*)

It is usual, however, to give notice to the Defendant to produce at the Trial, the notice of Action served on him, considering the copy kept as a copy merely: that however is, by the authority just cited, unnecessary. But I would advise such notice to produce papers, letters, &c. to be given in every Action, where any part of the transaction on which the Action is founded, has taken place through the medium of writing or correspondence.

VIII.—Every Instrument which requires a stamp should be carefully compared with the Table of Stamps before the Trial, to see that it is properly stamped, and as to what are the proper stamps: the Rules are these—

1. Every Instrument ought to have the Stamp appropriated by the Stamp Acts to such Instrument, and of the value required by the statute. But, by Stat. 43 Geo. III. c. 127. if the stamp is of the proper denomination, but of a higher amount than the Instrument produced required, it may be given in evidence. And this has been carried still further, by Stat. 55 Geo. III. c. 184. s. 10. which enacts that, even though the denomination is wrong, yet, if the stamp is of equal or greater value than could be

required for the Instrument offered in evidence, it will be effectual; except in cases where the stamp used on such instrument is specially appropriated to any other instrument, *by having its name on the face of it.*

If, therefore, the Instrument, which is to be given in evidence, is stamped with a stamp not having any name on it, it is necessary now only to look that it is of sufficient value or amount.

2. But, though an Instrument may have a wrong stamp, or when produced is found to have none, it yet may be admitted in evidence for collateral purposes; such as for a witness to refresh his memory by it, for which purpose he may refer to an unstamped receipt. (*f*) So, if there were two parts of an agreement, one stamped in the possession of the Plaintiff, and an unstamped one in the possession of the Defendant, and the Plaintiff has had notice to produce his part, which is stamped, and he does not, the unstamped agreement may be given in evidence for the Defendant. (*g*)

3. Where there are many Parties to a Deed, if they all have a claim upon the same fund, which is the object of the Deed, a single stamp is only required, though each claim a separate part; as, *ex. gr.* a composition Deed with creditors. But, where each claims under a distinct right, out of one common fund or subject, there must be distinct stamps. (*h*)

(*f*) 1 East. 460. 4 Esp. N. P. C. 213.

(*g*) 1 Taunt. 507. 1 Camp. 501.

(*h*) 13 East. 232.

These are the general Rules applying to all cases of Trials at Nisi Prius: and I shall now proceed to consider, separately and distinctly, the Evidence necessary in every Action so tried there.

CHAPTER II.

OF SETTLING THE EVIDENCE IN THE ACTION OF ASSUMPSIT.

IN treating on this subject, as it applies to this Action, I shall first point out the evidence which is required to support this Action in the different cases of it tried at Nisi Prius, that is, the evidence on the part of the Plaintiff; and, 2ndly, That of which the Defendant may avail himself in answer. These rank chiefly under the following heads, on the part of the Plaintiff:—

- I.—In the case of express contracts in writing.
- II.—In the case of express contracts, which may be made either verbally or in writing.
- III.—In the cases, as far as they respect the persons of the contending parties, and the relation in which they stand to others.
- IV.—The Evidence on the part of the Defendant.

Of express contracts in writing; the most important are—1. Bills of Exchange and Promissory Notes.—2. Policies of Insurance.

I.—*Of settling the Evidence in Actions on Bills of Exchange, and what it is necessary for the Plaintiff to prove.*

1. The Plaintiff must produce at the Trial, the Bill of exchange, or the Promissory Note itself declared upon. Evidence of the loss of the Bill, or Note, will not entitle the Plaintiff to give a copy in evidence; it must be proved to have been destroyed, for, unless the actual destruction of the bill or note is proved, the Plaintiff cannot recover by the production of a copy of it, or at all. (a)

Wherever, therefore, the Plaintiff offers a copy in evidence, he must call a witness to prove that the bill or note was subscribed or drawn in the Defendant's hand-writing: that what is offered in evidence, is an accurate copy or transcript of it, by having compared it with the original; and, lastly, to prove the actual destruction of it.

II.—The Plaintiff is never called upon to prove the consideration he gave for the Bill, or his title to it; unless the consideration, or his title to it, is first impeached by evidence produced by the Defendant. (b) The bare production of the Bill is, therefore, *primâ facie* evidence of title in the Plaintiff.

The Evidence which will entitle the Defendant to call on the Plaintiff to prove the consideration given, or his title to the Bill, is, *e. g.* that he was swindled out of it;

(a) 3 Campb. 324. 4 Taunt. 602. 1 Esp. Dig. N. P. 176.

(b) 1 Esp. Dig. N. P. 178. 4 Taunt. 115.

that it was given for an illegal consideration ; or, that it was stolen from him, or lost. These circumstances, though not sufficient to prevent the Plaintiff from recovering the amount, if he was a *bonâ fide* holder of it, and not implicated in the fraud or illegality, yet, from the circumstances of distrust and doubt thrown on the negotiation of the Bill, he is required to prove the consideration which he gave, or how he became possessed of it. (c)

Wherever, therefore, it is expected, that the Defendant means to bring forward any such evidence, the Plaintiff must not content himself with proof of the hand-writing only ; but must be prepared to show, how he became possessed of the Bill, and the consideration which he gave for it.

In the King's Bench, the Defendant may bring forward this Evidence at the Trial : in the Common Pleas, the Court have made a Rule that the Defendant must give notice of his intention to do so.

III.—The Plaintiff being the holder of the Bill, is either the Payee or the Indorsee ; and the Evidence required when the action is against different parties on the Bill is as follows :—

1. If *the Action is by the Payee against the Acceptor* of a Bill of Exchange, or the maker of a Promissory Note, the Plaintiff is required only to prove the hand-writing of the Defendant ; and there is no necessity to prove a previous demand of payment on him ; nor to prove the drawer's hand-writing.

(c) 4 Taunt. 115.

2. If the Action is by the Payee against the Drawer of the Bill of Exchange: if the Bill was accepted, the Plaintiff must prove the acceptor's hand-writing to the Bill, or otherwise identify him as the acceptor; a demand of payment of it from him when due; that he did not pay it, and notice of his neglect or refusal given to the Defendant: and then prove the Defendant's hand-writing as drawer of the Bill, which is sufficient.

If the Bill was refused acceptance: the Plaintiff must prove, that the Bill was tendered for acceptance to the drawee as described in the Bill, and his refusal to accept; and then prove notice of his refusal given to the Defendant, whose hand-writing must be proved.

3. If the Action is by the Indorsee against the Acceptor: in case of a single indorsement, which must be by the payee, the Plaintiff must prove the Defendant's hand-writing to the acceptance, and the Indorser's hand-writing on the back of the Bill.

What is said here of a single Indorsement, means a general Indorsement by the Payee by putting his name on the back of the Bill; which is called an indorsement in blank; but if he made a special indorsement, as to pay to A. B.; then the indorsement of such person must also be proved. (d)

If there are several Indorsers, whose indorsements are stated in the Declaration, their hands-writing should all be proved. But, as it is usual to have a second count in the Declaration against the acceptor, stating the first indorse-

(d) Vide Chitty on Bills, 502, last Ed

ment only ; proof of the first indorser's hand-writing only, will, in that case, entitle the Plaintiff to recover.

IV.—If the Action is *by the Indorsee against the Drawer of an accepted bill*: the Plaintiff must prove the hand-writing of the Acceptor, or otherwise identify him as the Acceptor, of the Payee, or first indorser, and of the Defendant. He must then prove a demand of the payment of the Bill when due of the acceptor, and his omission, or refusal, to pay it ; and notice of his default duly given to the Defendant.

But, if the *Bill was not accepted*, the Plaintiff must prove the hand-writing of the Indorser, and of the Defendant ; and that the Bill was presented for acceptance to the Drawee, as described in the Bill ; his refusal to accept, and notice to that effect given to the Defendant.

V.—If the Action is *by the Indorsee against the Indorser*, the Plaintiff is not called on to prove the hand-writing of the Drawer, or prior Indorsers, but he must prove the hand-writing of the Defendant and of the acceptor, (if the Bill was an accepted one,) and a demand, and refusal, or omission, to pay it when it became due, and due notice to that effect given to the Defendant. (e)

If the Bill was not accepted, the Plaintiff must prove, that the Bill was presented to the Drawee for acceptance, as described in the Bill, and which he refused or omitted to do, and notice of that circumstance given to the Defendant ; and that, with proof of the Defendant's hand-writing, will be sufficient.

(e) Vide 2 Camp. 182.

VI.—“ The Cases here put, are of the common ones, of acceptance by a single person, on whom the Bill is drawn, and who subscribes his name to it in token of acceptance ; but there are other cases, in which a Party is made liable as acceptor, though the acceptance is not so made. These are cases of acceptance by procuration, by letter, by parol, by withholding or destroying the Bill, or by one Partner for another. So there are conditional acceptances, or acceptances payable at a particular time or place : in all of which cases, the proofs must be attended to.”

1. *If the acceptance is by procuration, or agency* ; as that is an acceptance by one man in his own name, for another, who is the Drawee of the Bill, and who is sued as the Acceptor, by virtue of an authority given by him for that purpose ; in order to bind the Principal, Evidence must be given of that authority ; for that purpose the person himself by whom this acceptance was made may be called as the witness to prove it ; it is the best Evidence, and should always be had if possible. If that witness cannot be had : proof of a power of attorney given by the Defendant, to him who as agent accepted the Bill, will be good Evidence ; so would the declarations or admissions of the Defendant, that he had authorized the party to accept Bills for him. And, lastly, it would be sufficient to fix the Defendant as Acceptor, that the Agent was in the habit of so accepting Bills on his Principal's account, which the latter, in many instances, had paid ; but in this case of an acceptance by procuration, Evidence of the authority to accept by some mode or other, is indispensable. (f.)

(f) *Johnson v. Mason*, 1 Esp. N. P. C. 89.

2. *If the Acceptance is by letter* ; the Defendant's hand-writing subscribed to the letter must be proved ; and it must be clearly made out that the promise to accept, so given by letter, referred to the Bill on which the action is brought, either by its having been enclosed in the letter, or stated in the letter, or referring to it in unambiguous terms.

3. *If the Acceptance is by parol* ; that must be proved by a witness who heard the Defendant say, that he would accept the Bill : and the same attention must be paid to the identifying of the Bill with the parol acceptance ; such as, *e. g.* if the witness had the Bill in his hand at the time when the Defendant said he would accept it.

4. If a person on whom a Bill is drawn, and presented for acceptance ; in place of returning it either immediately or if demanded, within due time after it has been left for acceptance ; *withholds it for a length of time, or destroys or defaces it* ; he has been held to be chargeable as the Acceptor. (g) In such case the Plaintiff must prove a copy of the Bill which was left with the Defendant, in case the Plaintiff has never obtained possession of it and prove the delivery of such Bill to the Defendant at a particular time ; a demand of the bill in due time after, and that the Bill was not returned : was destroyed or defaced.

5. If a Bill is *accepted by, or indorsed by a Firm*, consisting of several Partners in that name, whose names at length stand as Defendants on the Record, the Acceptance or Indorsement must necessarily be in the hand-writing of

(g) Chitty on Bills, 194, and the cases there cited ; *tamen quare*, *et vide* *Jeune v. Ward*, 1 Barn. & Ald. Rep. 655.

one of them ; in that case the Plaintiff must prove the hand-writing of such Partner, and that he is a member of that Firm consisting of the Defendants on the Record. (*h*) But if *there are several acceptors' names* on the Bills the Plaintiff must prove the hands-writing of each of them. (*i*)

6. If the *acceptance is conditional*, as, *e. g.* "accepted payable on the arrival of a ship," the Plaintiff must not only prove the Defendant's hand-writing to the Bill, but he must give Evidence of the actual arrival of the ship.

So if the acceptance of a Bill is "*payable at a particular place*," (*k*) the Plaintiff must prove a demand of the payment of the Bill at that place ; as for example, in the common course of business *at a Banker's* : and in such case it is incumbent on the Plaintiff to prove, not only a demand of payment at the Banking-house, but within the usual hours of business ; that is, before five o'clock in the afternoon.

7. If the Bill is *payable to bearer*, proof of the acceptor's hand-writing only is sufficient.

VII.—These are the cases which usually occur, in which the Evidence is given in Court, on the production of the Bill itself, and with reference to the names on it : there are however two cases of collateral evidence, which are of themselves sufficient proof of the Plaintiff's case ; and in which no further evidence is required.

(*h*) Peake, N. P. C. 16. Chitty on Bills, 488.

(*i*) 1 Esp. N. P. C. 135.

(*k*) 7 East. 385. 1 Mau. & Sel. 28.

1. If the *Defendant* has paid money into Court on the whole Declaration, in which the Defendant is declared against as a Party on the Bill, it is sufficient Evidence for the Plaintiff, to produce at the Trial, the Bill of Exchange, and the copy of the Rule for the payment of the money into Court. (l)

2. If the Defendant is sued, as Acceptor of a Bill of Exchange, on which there were several indorsements, and when the Bill became due he has asked for time for payment, (m) or if, when it became so due, he promised payment; (n) this supersedes the necessity of going into proof of the hands-writing of the parties whose names are on the bill; or of notice of its dishonour. But the request or promise must be distinctly proved, and also that it applied to the Bill of Exchange mentioned in the Declaration: of this the best Evidence is, that of a witness who applied for the payment of the Bill in question, and produced it to the Defendant at the time when he asked for time or promised to pay it.

VIII.—“In laying down the Rules applicable to such cases of Evidence as are before stated; *Notice of the dishonour of a Bill is always required*, where the party sued was not first liable, but becomes so, by reason of the default of the party who was so: this is the case in all Actions on Bills against the drawer or indorser, who, being only liable on the default of the acceptor, notice is required to be given of his default to the Defendant, or the Plaintiff will be nonsuited.”

(l) 3 Campb. 40.

(m) 6 Esp. N. P. C. 43.

(n) 7 East. 230.

1. With respect to this notice—it should be given by the holder of the Bill when it became due, and may be either verbally, or by letter. (o)

If the notice was verbal, it is proved either by the person who gave it by the Plaintiff's direction, or heard him give it : and the witness must be able to prove, that it applied to the Bill on which the action is brought.

If the notice was by letter, which is good notice ; the Plaintiff should produce and prove a copy of the letter written by him to the Defendant, informing him of the non-payment or dishonour of the Bill ; this is done by calling a witness, who examined the copy produced with the original letter, and it must appear that it was addressed to the Defendant. This letter, the witness should be able to prove, was either put into the Post-office : delivered to postman : or sent away in the usual mode of sending letters to the Post from the Plaintiff's house : or was personally delivered to the Defendant himself ; and he should also be able to speak accurately as to the day and time on which it was put into the Post-office, or delivered to the Defendant, which at furthest should be the next day : but, in order to admit this Evidence, the Defendant must be served with a notice to produce the original letter.

If, in consequence of such notice to produce, the Defendant produces the original letter, it speaks for itself ; if not, the Evidence above-stated will be sufficient.

2. The case just now mentioned is, when the indorser

or drawer of the Bill, or his residence, is known, so that the notice of the dishonour of the Bill given by letter, may be presumed if sent by the post to have come to his hand ; but it frequently happens that *he is not to be found*, and, when sued, he relies on the want of notice of the dishonour of the Bill in due time, as amounting to a discharge of him. To answer this case, the Plaintiff should be prepared to show, by a witness, every degree of diligence and attention on his part used to find him out ; such as by proving inquiries made where he lived last, or in places where he was known to resort, or of persons likely to know something concerning him, and that all inquiries were ineffectual.

This Evidence should also be had in cases of actions against the Drawer or Indorser, in which a previous demand on the Acceptor must be proved ; but which, if he cannot be found, after inquiries made, and endeavours to find him proved, as stated, will be sufficient Evidence to satisfy the necessity of a demand.

3. In actions on foreign Bills of Exchange, a protest must be proved to have been made, and be produced.

In the case of Actions upon Promissory Notes, the Rules as to Evidence are the same as those laid down with respect to Bills of Exchange. The maker of a Promissory Note is as the Acceptor of a Bill of Exchange, and must be first resorted to for payment ; and as his default creates the liability of other parties on the Note, they must have notice of it in due time ; and if sued, they are entitled to call on the Plaintiff, (the holder of the Note,)

to prove a demand of payment by him made on the maker of the Note, his default and notice of it to them. It was observed by Lord *Mansfield*, that a Promissory Note assumes the form of a Bill of Exchange when indorsed, for then the maker of it becomes as the Acceptor; the person to whom it is payable, the drawer; and the Indorsee the Payee.

The Rules, therefore, laid down as to the Evidence on Bills of Exchange, will be found precisely to apply to actions on Promissory Notes.

Thus in an action on a Promissory Note by the Payee against the maker, proof of the hand-writing of the latter only is required.

If it is by the Indorsee of the Note against the maker, proof of his hand-writing, and that of the Payee, who is necessarily the indorser to the plaintiff, is sufficient.

If the Action is by the Indorsee against the Indorser, (the payee,) proof of the hand-writing of the maker and indorser are required, and *also* of a demand on the maker of it for payment; and his neglect or refusal, and notice to that effect, given to the Defendant.

The Rules as to notice, and in every other respect, are the same.

And note, that whenever a witness's name appears to the signing, accepting, or negotiating, any Bill or Note, he must be called to prove it; and, if he denies having seen

the Party subscribe his name, the hand-writing may be proved by other means. (*p*)

(*p*) 2 Campb. 636. Peake, N. P. C. 23, and 136.

Of the Evidence on the part of the Defendant in Actions on Bills of Exchange and Promissory Notes.

These matters of defence usually are—Usury, Fraud, or that the Bill or Note was given for a consideration contrary to law, or without any consideration whatever.

This last defence can only be available between the originally contracting parties themselves; for, if a Bill or Note is passed to a third person by a *bonâ fide* indorsement, the party sued on the Bill or Note cannot set up the want of consideration as a defence against him; for the act of acceptance and signing a Promissory Note, imports a consideration to all the world. But, as between the Parties themselves, as between the Acceptor and the Drawer of a Bill, payable to his own order, or between Payee and maker of a Promissory Note, the acceptor of the Bill, or maker of the Note, being in either case sued by the Payee, may set up as a good defence, that there was no consideration; and, if that is proved, the Plaintiff cannot recover.

It was held, until passing the Act of Parliament 58 Geo. III. c. 93. that if a Bill of Exchange, or Promissory Note, had been given for a usurious consideration, all securities being declared by the Statutes against usury, as

void in law, the defence of usury could be set up against any Indorsee, even though ignorant of the usury, and though he had given a *bonâ fide* consideration for the Bill or Note ; that Statute, however, enacts, " That no Bill of Exchange, or Promissory Note, which shall be drawn after the passing of the Act, (June 10, 1818,) shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an Indorsee for a valuable consideration, unless such Indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such Bill of Exchange, or Promissory Note had been originally given for a usurious consideration, or on a usurious contract."

The defence of usury, therefore, where the Action is by an Indorsee of a Bill or Note, is quite taken away, unless the Defendant can bring home to him a knowledge of the consideration being originally usurious. The Defendant may, in such case, prove that knowledge, by showing that the Plaintiff was present when the Bill or Note was drawn, and knew on what account it was made ; or that he was told of it before he took such Bill or Note : if he is able to do so it will be no answer for the Plaintiff to show that he gave for it a *bonâ fide* consideration.

What the Statute has enacted in the case of usury, was always the law, where the defence was fraud, or the illegality of the consideration. The Acceptor of a Bill of Exchange, or maker of a Note, could never set up against an Indorsee, that he had accepted the Bill, or drawn the Note, for an illegal consideration : such as, *e. g.* for illegal insurances in the lottery, or was induced to do so by a fraud practised on him by the Payee, unless he could im-

plicate the Plaintiff with full knowledge of it : but such would be good Evidence if the Action was by the Payee himself against the Acceptor or maker of the Note.

The most usual defence in Actions of Bills of Exchange, or Promissory Notes, is want of notice of the dishonour ; but, as this is affirmative Evidence on the part of the Plaintiff, that he did give due notice, as stated before ; the Defendant has only to see that such notice is proved to have been given to him in due time. If notice was given by letter, to make it Evidence of notice, the Defendant should have had notice to produce the letter. If Defendant has it, he should produce it ; and the Post-mark on the letter will show the actual time of its being put into the office, which, if it was too late, the Plaintiff will be nonsuited ; or he may prove by other testimony, the actual time of receiving the notice.

The Defendant should also attend to the stamp ; as, if it is not correct, the Plaintiff cannot recover on the Bill or Note.

The second description of written agreements proposed to be considered was, Policies of Insurance, I shall therefore proceed to lay down :—

1. *The rules for settling the Evidence for the Plaintiff in Actions on Policies of Insurance ; and, first, on the part of the Plaintiff.*

The Plaintiff in this Action declares in Assumpsit on the Policy. (q) The material averments in the Declaration

(q) 1 Esp. Dig. N. P., from 73 to 105.

which are necessary to be distinctly proved, are—1. That the Defendant subscribed the Policy.—2. That the Plaintiff was interested to the amount of the sum set opposite to the Defendant's name.—3. That the Ship sailed on the voyage insured, and was lost by the means insured against, and as stated in the Declaration.

The course of Evidence at the Trial at *Nisi Prius* is, first, to produce the Policy itself, observing that it is properly stamped.—2. To prove that the Defendant subscribed the Policy in the character of an underwriter is the next step; this is either in the Defendant's own hand-writing, or by some Person deputed or authorised by him to sign Policies for him.

If the Policy is subscribed by the Defendant himself, it is sufficient to prove his hand-writing; if it is by another Person in the common form of "A. B. for C. D. (the Defendant) 200*l.* *e. g.*" it will be then necessary to prove such Person's hand-writing, and also that he was authorized by the Defendant to subscribe Policies for him. To prove this, the Party so authorized is the usual, and in fact the best witness; as he can prove as well the authority given to him for the purpose by the Defendant, as his own subscription of the Policy; but if he is dead, or cannot be brought forward: the Plaintiff must prove that Person's hand-writing, and then call witnesses who can speak to the Defendant's having given him such general authority; by the admission of the Defendant himself, or by his having paid losses on Policies so underwritten in his name. The subscription to the Policy, and the circumstances attending it, as to the representation and warranty made at the time, when material; are usually proved by the Broker who effected the Policy.

3. It next becomes necessary for the Plaintiff to prove, that he, or if the Insurance is by an Agent, that the Principal, is interested to the amount of what he seeks to recover.

If the Policy is on the Ship, it has been held to be sufficient Evidence for him to show that he was in possession of her; (*r*) but if there is any doubt in that respect, or that the Plaintiff's property in her may be disputed, he should be prepared to show a complete and perfect title under the Ship Registry Acts. It will be mentioned more at large hereafter how such a title is to be made out. (*s*)

If the Insurance is on Goods : the Plaintiff must show the shipping of them on board the Vessel insured, and the value, and that they belonged to him or to his principal. For this purpose (*t*) the Bill of Lading is Evidence to the extent of it, if signed by the Master or Mate, and of the Consignee's interest; (*u*) but if there are the words, "Contents unknown," also signed by them, so that they do not charge themselves with the receipt of any goods in particular, the Bill of Lading is no Evidence either of the quantity or value of the goods, or of the interest of the Consignee. But though this may be a summary mode of proof of interest, the Plaintiff may prove the actual shipping of the goods on board, and the value of them, which will be sufficient to support that averment. This may be done by witnesses who knew of such shipment having been made, and of its value.

4. The sailing of the Ship on the voyage insured, is

(*r*) 4 East. 430.

(*s*) 5 Term Rep. 712.

(*t*) 1 Esp. N. P. C. 373.

(*u*) 3 Taunt. 303.

next to be proved; but as the voyage is always from a Place to some other Port or Place, and the time of her sailing is material, these facts are also necessary to be proved. These facts are generally proved by the Master, Supercargo, or some of the Ship's crew, who, from being on board, are able to speak to the facts: but the loss must be proved to have taken place by the means described in the Declaration; as if the loss is stated in the Declaration to have arisen from Capture, it would be a variance if proved that it was by perils of the sea, and would not support the Declaration.

It, however, not unfrequently happens, that a Ship at Sea founders, and all the Crew perish, so that there is no Evidence to be had from any of those who had been on board, and the Declaration states the loss to be by perils of the Sea; in that case, the averment of loss is supported by Evidence to this effect. (v) That the ship sailed at a particular time from the Port from whence she was Insured; that the usual time taken to perform the Voyage Insured was of a certain period; and that though that time is long since elapsed, she has never been heard of: this is Evidence to go to the Jury of a total loss.

In actions on Policies of Insurance, (x) the Assured and Insurers are bound to the strictest adherence to the terms of the Policy; any concealment, misrepresentation, or breach of the warranty given on the Policy, discharges it; and as these matters are rather matters of defence, than as required to be proved on the part of the Plaintiff, I shall

(v) 2 Stra. 1199.

(x) 1 Esp. Dig. N. P. 81. and to page 89.

consider them under the head of Evidence for the Defendant.

2. *Of settling the Evidence on the part of the Defendant in Actions on Policies of Insurance.*

Policies of Insurance are construed strictly, and any failure on the part of the Plaintiff, as to any matter arising under it, or any fraud, will vitiate it wholly.

The usual subjects of defence are—

1. *Concealment of Circumstances.*—Such as, in case the Ship had sailed, when she was last heard of; (y) whether she had met with bad weather and been forced into another Port. In fact, the concealment of any circumstance which may vary the risk insured against, will have the effect of avoiding the Policy:

2. *A false representation.* (z)—Such as, that the Ship was seen in a particular place or latitude, at a particular day, which turns out to be otherwise; that she had such a Crew, or so many guns, which she had not; and this, though made by the Insurance Broker, shall avoid the Policy. (a)

3. *A false Warranty.* (b)—This only differs from a representation in this respect, that it makes part of the Po-

(y) 1 Esp. Dig. N. P. 86. 3 Burr. 1909.

(z) 1 Esp. N. P. Dig. 81. Dougl. 247.

(a) 1 Campb. 530.

(b) 1 Esp. Dig. N. P. 82.

licy, it being written on it; any defect or failure in the circumstances so warranted, renders the Policy absolutely void. Such as, if a Ship is warranted to be a neutral : to carry so many guns : to be in Port when the Policy is signed ; when, in fact, she has sailed : or to sail with Convoy when she has not done so. All these being falsified by the Defendant are good Evidence to defeat the Action.

In preparing the Evidence as to these points, what the warranty was, appears by the production of the Policy itself. But what circumstances were mentioned, or Documents shown to the Defendant, before he underwrote the Policy, or what representations were made to him at the time, is matter of *vivâ voce* proof.

What the representations were, and what Documents were produced, the Broker who effected the Policy is the usual witness to prove ; but as he is, for the most part, favourable to the Insured, and may state the representations made by himself differently for the truth, he may be contradicted, or Evidence in chief be given by Persons who heard it, or who knew of the representations made to the first Underwriter on the Policy, which is Evidence of the actual representation made by the Broker when the Policy was first underwritten. (c)

If the facts turn out to be different from the representation, it avoids the Policy ; but those facts are matters of positive Evidence.

Thus, the Defendant may prove, that the Ship represented to be in Port, had, in fact, sailed some days before ;

that she had met with a gale of wind, by which her timbers were strained; (d) that, though represented to have a certain Crew, she had not so many on board. It is impossible to enumerate all the circumstances at length, forming matter of defence; it is sufficient to observe, that it is a contract *strictissimi juris*, and good faith in the entering into it, and in the performance of it, are always required; therefore, the smallest deviation, except for good cause, from the track of the voyage, avoids the Policy. This deviation may be proved by any one on board, or by Persons on board another Ship who saw her out of her latitude and course of the voyage. But, independently of express contract, there is this implied; one, that the Ship at the commencement of the voyage was sea-worthy: properly documented, for the voyage: of the country described in the Policy, if not an English vessel. The fact of sea-worthiness is usually proved by calling Ship-builders, or persons acquainted with Shipping, to speak to the fact.

But, it should be observed, that the Protest of the Captain is in no case Evidence of the facts contained in it, nor are the written opinions of Persons who surveyed the Ship, as to her sea-worthiness.

In questions concerning losses, the Sentences of Courts of Foreign Judicature are good Evidence, and are given in Evidence by producing copies of the Judgment under the Seal of the Court. (e)

With respect to *vivâ voce* Evidence.

(d) 1 Esp. Dig. N. P. 80.

(e) 4 Esp. N. P. C. 228. Vid. Esp. Dig. N. P. 177.

1. The Consignee of the Cargo is a good witness to prove the interest. (*f*)

2. To disprove Barratry, the Master of the Vessel is ~~in~~ ^{an} an admissible witness, unless released by the underwriter. (*g*)

3. If the sea-worthiness of a Vessel is disputed in an Action on the Policy, (*h*) the best Evidence is, either that of the Persons who repaired her before the voyage, or who surveyed her before she sailed : but the Captain, or any of the Crew, may prove the same ; but it must, in all cases, be observed, that it is sufficient to prove her sea-worthy at *the time of her sailing*. (*i*)

II.—Having now stated how the evidence is to be settled in Actions on Bills of Exchange, Promissory Notes, and Policies of Insurance, which are contracts wholly in writing, I shall proceed to consider the Evidence necessary in this Action, on Contracts, which may be either by parol, or in Writing ; and point out in what manner it is to be settled for Trial.

The principal heads under this head are Actions.—1.

(*f*) 2 Esp. Dig. N. P. 175. 3 Taunt. 303.

(*g*) 1 Esp. N. P. C. 339.

(*h*) 1 Esp. Dig. N. P. 89.

(*i*) Park. Ins. 220.

For Use and Occupation.—2. On Special Agreements.—
3. On Contracts of Sale.—4. On the common Counts in
this Action.

1. *Of settling the Evidence in Assumpsit for Use and
Occupation.*

First, on the part of the Plaintiff.

This form of Action is now used in place of the Action of Debt for Rent; but the latter Action still may be maintained; (*k*) and in settling the Evidence, these rules are to be observed.

1. Where the Defendant has become Tenant to the Plaintiff, (*l*) by a taking from him by a direct contract, no further Evidence is required on the part of the Plaintiff, than to prove: That he let the Premises to the Defendant, whether they are Lands, Houses, Lodgings, or Tenements of any description, at a certain Rent, or that he let him into possession of them as Tenant; That the Defendant occupied them as such, for the time for which the Plaintiff seeks to recover Rent. He must then prove the amount of the Rent reserved, if there was an agreement for the Rent to be paid; or if not, what is the yearly value of the Premises; or if let by the quarter, month, or week, the value for that time.

But, if the Defendant has ever paid Rent to the Plaintiff, proof of that alone establishes the Plaintiff's right to recover. (*m*)

(*k*) 6 Term Rep 62.

(*l*) 1 Esp. Dig. N. P. 29.

(*m*) Peake N. P. C. 192. 2 Taunt 147.

2. Such is the case where the Plaintiff has himself let the Premises to the Defendant, or where the Defendant has paid him Rent; but if the Plaintiff claims as Heir, Executor, or Administrator, Devisee, or Assignee, of the first Lessor, and the Defendant has never paid him Rent, then further Evidence is required to establish his title to the Rent. In all these cases, therefore, the Plaintiff must first show: That the Defendant held, as Tenant, to the Person under whom he derives title, by the same Evidence, as above stated, where the Action is by the original Lessor. Having done so, if the Plaintiff's title is as Heir, he must prove his ancestor's death, and that he is Heir to him; this is where the Lessor is seized in fee. If the Plaintiff claims as Executor or Administrator, he must make *proof* of the Probate, or Letters of Administration, which will be sufficient, if there is no Plea of *ne unques Executor or Administrator*, but, if there is, the Probate or Letters testamentary must be produced. This is the case where the Lessor was himself only entitled as Lessee for years to some other Person, in which case the term passes to the Executor or Administrator of the deceased.

3. *If a Devisee is the Plaintiff*, and the Lessor was Tenant in fee, the Plaintiff must prove the Testator's will by calling the witnesses; for which see *post*, Chapter of Ejectment. But, if the Plaintiff is a Legatee, and the deceased had himself but a term for years in the Premises, which *he has bequeathed to the Plaintiff*, he must produce the Probate of the Testator's will, and show the consent of the Executor to the Devise, as necessary to give him a title to the Lease, by virtue of which he claims to be entitled to the Rent.

4. *If the Plaintiff claims as Assignee* of the Lessor, he must make out a regular title from him, by proving the several Deeds and Conveyances giving him title. But, it must be observed, as a general rule in settling Evidence for Plaintiffs, that proof of title is only required, where the Plaintiff is a Person whom the Defendant has never recognised as his Lessor; for, as has been observed, where the Action is between the originally contracting Parties, (n) proof of the taking of the Premises from the Plaintiff, and the occupation by the Defendant by his permission, or if the Defendant has paid him Rent, or if a distress has been made on the Defendant for Rent, and it has been levied under it; all these cases, on being proved, are sufficient Evidence of the Plaintiff's title, and the Defendant cannot call for any other, and is himself precluded from impeaching it. (o)

5. All these facts last stated, may be proved by witnesses; but, if there was *any agreement in writing*, not by Deed, between the Parties, specifying the letting, the term, the rent, &c. the Plaintiff may give this in Evidence by Stat. 11 Geo. 2. c. 19. under the general Count in Assumpsit: "That the Defendant was indebted to the Plaintiff in *l.* for the use and occupation of a certain dwelling-house, *e. g.* before that time had, used, occupied, and enjoyed by the Defendant by the Plaintiff's permission, &c." But, if the Plaintiff proves the letting of the Premises to the Defendant, it is not required of him to prove, that the Defendant actually entered and occupied them; it is sufficient that the Defendant might have done so if he pleased, and was not prevented by the Plaintiff.

(n) 1 Esp. Dig. N. P. 31.

(o) 3 Campb. 372. 5. T. Rep. 5.

2. Of the Evidence on the part of the *Defendant*, in Assumpsit for Use and Occupation.

This is what he may give in Evidence under the Plea of non-assumpsit. He may show—

That the Premises were let for an unlawful purpose, as for a Brothel, for example ; and the Plaintiff, in such case, cannot recover. (*p*)

That, though the Defendant entered and occupied the Premises, (*q*) it was not in the character of a Tenant, but that he was let into possession on a treaty for a sale of them, which was not carried into effect. (*r*)

That the Lessor was bound to put the Premises into repair before the Defendant took possession, which he had not done, and that they were not habitable. But it will not be a defence, that the Premises were burnt down. (*s*)

It has however been held, that though the Defendant, the Lessee, cannot controvert his Lessor's title ; yet he may show, that it is at an end, and that he has been called upon to attorn to another. (*t*) So he may show that the Lessor was Executor *durante minore ætate* of A. B. and that A. B. became of full age and claimed the Rent : that the land was Copyhold, and forfeited to the Lord of the Manor, to whom he paid Rent : but in such case the Defendant must go further, and show that the Person from whom he

(*p*) 1 Esp. N. P. C. 13.

(*q*) Peake, N. P. C. 192.

(*r*) 2 Taunt. 147.

(*s*) 4 Taunt. 45.

(*t*) 1 Esp. Dig. N. P. 31.

took the Premises was informed of it, and that he renounced the Tenancy, and entered into a new contract with the Person under whom he then claims. (u)

All these matters are proveable by *vivâ voce* Evidence.

2. *Of settling the Evidence in Actions on Special Agreements.*

1. On the part of the Plaintiff.

Special agreements are the objects of this Action of Assumpsit, and such agreements may be either verbal or in writing, on either of which that Action is maintainable, except in cases under the Statute of Frauds, on which no Action can be brought unless they are in writing. These cases are :—1. Where it is to charge an Executor or Administrator to answer damages out of his own estate.—2. To charge Defendant for the debt, default, or miscarriage of another.—3. Where the agreement is in consideration of Marriage.—4. Where it is on a contract for the sale of Lands, Tenements, or Hereditaments, or any interest in them.—5. Where the agreement is not to be carried into effect within the year.

The decisions on which will be found in the law of *Nisi Prius*, as referred to in the margin. (x)

Where the *Action is on a special agreement which has been reduced into writing*, it is first necessary, in settling the Evidence, to see that it is properly stamped, and that

(u) 2 Campb. 11.

(x) Esp. Dig. N. P. 123, et ultra.

is necessary, whether the agreement is specially declared on, or it is a Paper to be given in Evidence, in any way, in support of the agreement on which the Plaintiff seeks to recover.

But on Agreements in these cases following no Stamp is required. (z)

1. If the Action is on agreement or memorandum for granting a Lease at rack rent, of any Lands or Tenements under the yearly rent of 5*l*.

2. If the memorandum or agreement is for the hire of any labourer, manufacturer, or menial servant.

3. If it is a memorandum, letter, or agreement made for, or relating to any sale of goods, wares, or merchandise.

4. If it is a memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise, from Port to Port in Great Britain.

5. On any letter containing any agreement in respect of any merchandise, or evidence of such an agreement as shall pass by post, between merchants and other persons, carrying on trade or commerce in Great Britain, and residing, and actually being, at the time of sending such letters, at the distance of 50 miles from each other.

6. On any label or memorandum containing the heads

(z) Vide Stat. 48 Geo. 3. 149.

of insurance to be made by the Royal Exchange or London Assurance Company.

In all these cases, any paper writing relating to them may be given in Evidence without a Stamp.

Where there is a special agreement, and the Plaintiff seeks to recover damages for the breach of it; as long as it is executory, (a) that is, as long as it is unperformed *in toto*, the Plaintiff is bound to declare on it; but if it has been performed, or has been rescinded, or prevented from being carried into effect by the other Party, (b) then the Plaintiff may declare generally, and give the written Instrument in Evidence; as, for example, if a Sailor was to enter into a written agreement for a voyage, and the Captain refused to let him serve, or sailed without him, (c) by which he lost the whole, or any part of the voyage, and an Action is brought by the Sailor, the Plaintiff must declare on the agreement, and go for the special loss: but if he had performed the voyage, he might declare generally for work and labour.

1. *If the Declaration is special on the agreement.*

In settling Evidence in Actions on special agreements, where the Plaintiff declares on the agreement, great care is required; (d) every averment in the Declaration must be proved precisely as averred in it, and the smallest varia-

(a) Esp. Dig. N. P. 160. Dougl. 24. 1 Term Rep. 134.

(b) 2 East. 147. 7 Term Rep. 181.

(c) Per *Eyre* C. J. 1 Bos. & Pull. 397.

(d) Esp. Dig. N. P. 162.

tion in a material part is fatal.(e) This, in the case of special agreements which have not been reduced into writing, often happens; but, when the agreement is in writing, as the Declaration is drawn from it, there is little danger of a variance in proving the contract to be as laid in the Declaration; the failure, in that case, can only take place where there is a failure of proof of the breach: If the contract or agreement is by parol, there is danger, not only as to proof of the agreement, but also of the breach.

1. At the Trial, the course of Evidence is this: the agreement, if *in writing*, must be produced; and if there be a subscribing witness to it, he must be called to prove it.

If the agreement was by parol, a witness, who was present at the making of it, must be called to prove what it was; in both cases the agreement produced, or that which is so proved by a witness, must be found to correspond with that laid in the Declaration; if it does not, the Plaintiff will be nonsuited.

Thus, for example, where the Plaintiff declared on an agreement "to deliver 40 sacks of corn on a particular day," and the agreement was proved to be 40 or 50; that was held to be a clear variance. (f)

2. Having proved the agreement, the next piece of Evidence which the Plaintiff must give, is, *in case any thing was to be previously done by himself, to prove that he has done it.*

As if the Plaintiff declared on a breach of an agreement,

(e) 4 Taunt. 285.

(f) Perry v. Porter, 2 East. 2.

by which the Defendant promised to pay him a sum of money in consideration of his executing to him a general release, the Plaintiff must aver and prove, that *he either did execute* such a release, or was ready to do so ; for, until he does so, he has no cause of Action. (g)

The best direction on this point, is to observe carefully the averments in the Declaration ; for, unless all that is necessary to give the Plaintiff a right of Action under the agreement, is averred in it, the Judgment will be arrested if the Plaintiff has a verdict, and all these must be proved.

But, in some cases, the Plaintiff must go further than averring a performance, or readiness to perform his part ; he must show that *he had a right* to do that which he promised, and which is the foundation of the Defendant's promise : as, if he declares on the Defendant's promise to pay a sum of money on the assignment of a Lease, he must give Evidence of his title to the Lease. (h)

3. The third matter of Evidence which the Plaintiff must prove is, *the breach by the Defendant*. Thus, if the Defendant was to build a house for the Plaintiff by a certain day, he should call a witness to prove that no house was built ; but this Evidence is unnecessary, where it lies on the Defendant to prove performance of his part ; as if the Declaration was an agreement that the Defendant was to pay 100 £. on the Delivery of 50 quarters of Corn at a particular place. It is sufficient for the Plaintiff to prove the delivery at the place, and it lies on the Defendant to prove the payment.

(g) 2 Burr. 899.

(h) Dougl. 598. 2 Marsh. Rep. 332.

4. The last piece of Evidence required, on the part of the Plaintiff, is *of the Damages*. These are either general or special, as laid in the Declaration, and are either liquidated or unliquidated. If the agreement states the sum agreed on as damages for the breach of it, the Plaintiff can only recover the amount, and nothing more is required than to prove the agreement and breach ; but if no sum is specified, so that the damages are unliquidated, then the Plaintiff must prove the damages, as laid in the Declaration, to such an extent as he can.

Thus, for example, if Plaintiff declares on a breach of agreement by the Defendant to deliver certain goods by a particular day, and then avers as special damage " that he was deprived of the opportunity of selling them to advantage," he may give in Evidence, that a particular person would have purchased them at an advanced price, and call that person to prove it, or that there was a considerable rise in the market for such goods, and where he could have sold them to advantage ; and then what he lost on the Sale, he may recover in damages.

2 *If the Declaration is general.*

If it is for work and labour, or money had and received generally, though founded on the agreement : the Plaintiff, in that case, must be prepared to prove the agreement, and also where any thing is to be previously done by himself, to prove, that it has been performed by him in all respects ; as, *e. g.* if the Plaintiff was to receive a sum of money on doing certain work by a certain time ; (*i*) when he has done

(*i*) *Poulter v. Killingbeck*, 1 Bos. & Pull. 397.

it, he may declare generally for work and labour, and give the agreement and proof of his performance in Evidence under such Count.

So he may declare generally on these Counts, if the agreement has been rescinded, or if the Defendant is unable to perform what he undertook, or by his own act has prevented the Plaintiff from doing his part : in all which cases, the Plaintiff must prove the agreement and the facts stated.

Thus, if the Action is to recover a deposite made on a Sale of goods by Auction, where the Auctioneer is unable to deliver the things sold ; or if made on the Sale of an Estate, the title to which is defective, so that the Buyer is not compellable to complete the purchase, or the Seller is unable to complete it within the time specified ; in all those cases, the Plaintiff may declare for money had and received, and at the Trial must prove the Sale by Auction : the particulars delivered by the Auctioneer : that he was declared the best Bidder, and that he paid the sum for which the Action is brought, as a deposite : this is usually done by the Auctioneer's receipt and proof of his handwriting. The Particulars are sufficient Evidence of the terms of the Sale ; and if they are not complied with on the part of the Auctioneer, the Party has an immediate right to recover his deposite by the Action for money had and received ; but if the thing sold was to be delivered by a given time, or a good title shown to an Estate sold within a given period, the Plaintiff should prove that he applied for the thing sold, or an abstract of the title to the Estate at the time specified in the Particular, and that he could obtain neither. So if he discovers that the Seller had no title to what the Auctioneer sold, as if the Auctioneer

furnished an abstract to the Seller's title to the Estate sold by Auction, and it appears on the face of it that the title is bad, the Buyer may sue for and recover his deposit.

2. *Of the Evidence for the Defendant in Actions on Special Agreements.*

The best positive Evidence, in answer to the Plaintiff's case, which the Defendant can give, is performance, or that he was willing to perform his part, and offered to do it; and that the Plaintiff refused to receive it; as if the Action was grounded on the non-performance by the Defendant of an agreement, by which the Defendant was to assign a Lease to the Plaintiff, and which the Plaintiff refused to accept of on the ground of a want of title; the Defendant may go into Evidence to show that he had a good title; and if he had, the Plaintiff had no right of Action.

So if the Plaintiff declares generally, and there is a special agreement. As the Plaintiff should declare on the agreement as long as it is executory; by showing the agreement, the Defendant will nonsuit the Plaintiff; but, as has been before observed, the Plaintiff may show, that the agreement was rescinded or performed on his part.

So if the Plaintiff declares for non-performance of an agreement, the Defendant may show that he was prevented from performing it by the Plaintiff himself; as if the Defendant was to finish a house for the Plaintiff by a given time, *the Plaintiff finding timber*, Defendant may show that the Plaintiff refused to do so.

3. *Of settling the Evidence in Actions of Assumpsit on contracts of Sale.*

These Actions are,—1. For the price of the things sold, which is recovered under the Count for goods sold and delivered; or, 2. To recover back the price paid for the thing sold, by reason of the defect of title in the Seller; or of Fraud in the Sale; as, by a false warranty respecting it; or, 3. To recover special damages for the non-delivery of it.

The first of these Actions, as it falls under the head of Assumpsit for goods sold and delivered; how the Evidence as to it is to be settled, will be treated of under that general head hereafter.

2. The second of these heads is Assumpsit for money had and received. (*j*) This Action is maintainable where there has been any Fraud in the sale by the Seller, and the Buyer has paid his money as the price of the thing bought; he may, in that case, return the thing bought to the Seller, and declare so in this Action to recover back his money.

As if a Horse be warranted sound, which proves to be unsound: merchandise warranted to be of a particular quality or description, which turns out to be otherwise, and the Buyer has paid for it; on returning the Horse or the goods, the law gives him the remedy, by Assumpsit for money had and received, to recover back the money he so paid.

(*j*) 1 Esp. Dig. N. P. 13.

When the Action is so brought, the contract of Sale must be at an end, or rescinded, and these facts must be proved at the Trial; the Plaintiff must first prove the contract of Sale, and the price paid.—2. The warranty or representation of the thing sold given at the time of Sale.—3. That the warranty or representation so made was untrue, and falsify it by calling witnesses to prove it to be so; and, lastly, the Plaintiff must prove that the contract was rescinded or at an end, that is, that he either returned the things sold or offered to do so, and that the Defendant either received them back, or refused to accept of them.

Thus, in the case of *Assumpsit*, to recover back the price of a Horse warranted sound, the Plaintiff must prove the Sale, and that at the time of the Sale the Horse was warranted sound, and the price he paid; he should then call witnesses to prove that the Horse was unsound; and, lastly, that he either returned him to the Defendant, or offered to do so, and that the Defendant refused to accept of him.

In these cases, (k) the *receipt for the price* usually specifies the sum as paid “for a Horse warranted sound,” and that receipt is received as sufficient Evidence of the warranty, as well as of the payment of the money by the Plaintiff to the Defendant; so that, on proving the Defendant’s hand-writing to the receipt, the Plaintiff is only required further to prove the unsoundness of the Horse, the return or an offer to return him, and the Defendant’s refusal to receive him.

(k) 1 Campb. 387.

It is also necessary to attend to the circumstances under which Sales take place; as Sales by sample or written contract; or Sales by the intervention of a Factor or Broker: as the Evidence varies accordingly, and must be therefore attended to.

When the Sale is by *sample*, (*l*) the bulk delivered must correspond with the sample, or the Sale is void, for it is a Fraud on the Buyer. In every case of this description, the Plaintiff should be prepared with a witness to prove, that the sample sold by, was fairly taken from the bulk, and should have some to produce in Court, to show that they correspond. This Evidence is, however, not required unless the Defendant rests his defence on that ground: otherwise the only Evidence which is required of the Plaintiff is of the general sale and delivery of the goods.

If the Defendant sets up that defence, that the sample differs from the bulk, he must produce the sample given at the time of the Sale, and prove it to be that which was so given. He should then produce part of the bulk delivered, and prove that it was fairly taken: he should then call witnesses acquainted with the article sold, who will state their opinion, as to their not being of the same quality or description, and if they are believed, the Plaintiff must fail. It is obvious, therefore, that where this defence is expected, the Plaintiff must be prepared to show that they are the same, by similar Evidence.

If the Sale is by *written contract*, (*m*) the delivery and description of the things sold must accurately correspond

(*l*) 2 East. 314.

(*m*) 3 Campb. 462.

with the contract, nor will it be considered as an answer, to the goods delivered not agreeing with the contract, that the Plaintiff had a sample also after the contract made, and was satisfied with it.

When the Sale is by the intervention of a Broker, or Agent, by whom the bargain is made, he is a good witness for either side, and he should be called. (n)

Another class of cases ranging under this head, are those of Sales by Auction. Assumpsit for money had and received being the proper form of Action to recover back a deposit made on such Sale, as on the Sale of an Estate, for example, where it turns out, that the Seller had no title to the thing sold, or was not prepared to complete the purchase at the time specified in the particulars of Sale.

The Evidence required, in this case, has been before mentioned in page 52.

3. The third description of cases arising on Sales differs from the second in this, that that is *indebitatus assumpsit*, being to recover back money paid: this is Assumpsit generally, and the Plaintiff seeks in the latter Action to recover special damage by reason of the Defendant not performing his contract of Sale, and that must be laid in the Declaration. Thus, for example, in the last case, of the Sale of an Estate by Auction, if the Plaintiff declares in *indebitatus assumpsit*, generally, for money had and received, he can recover his deposit only; but if he declares on the contract of Sale made by the Defendant, by which

(n) 3 Wils. 40.

he was declared the best Bidder at the Auction, and in consequence paid his deposit, pursuant to the particulars, he may go, after assigning the breach of performance by the Defendant, for special damage, as, that he was put to great expense in examining the title, in journeys undertaken on account of the Estate, and for the interest of money; and then, having proved the several matters stated in that case, (page 52) he may go into Evidence of these facts of special damage distinctly, and he can recover damages accordingly, but they must be stated in the Declaration.

4. *Of settling the Evidence under the common Counts in Assumpsit.*

I shall now consider the rules to be observed in the settling of Evidence on the common Counts of Assumpsit, as far as it respects general principles, the particular cases which occur being too numerous to find a place here: but it will be here necessary to state a few of them by way of example, to point out how Evidence is to be settled in similar instances. These Counts are in Assumpsit,—1. For money had and received.—2. For money lent and advanced.—3. For money paid to the Defendant's use.—4. For work and labour.—5. For goods sold and delivered; and, lastly, on an Account stated.

1. *Of the Evidence on the Count in Assumpsit for money had and received.*

This is a very general head, and lies in every case in which a person has received or obtained possession of the money of others, which he has retained or not paid over, and

which he has no legal title to keep : the cases arising under it must be, therefore, as various as are human transactions, and connected with the receipt or payment of money. The general rule, therefore, as to settling the Evidence, to enable the Plaintiff to recover on this Count is, that he must give the whole transaction in Evidence; *i. e.* he must prove the circumstances under which the Defendant received or got possession of the money, the amount, and then prove that he has no right to keep it, but that it belongs to the Plaintiff, who ought to receive it. I shall exemplify this general position by cases which range under the different grounds of this head of Assumpsit, which require no Evidence of any promise on the Defendant's part to pay, but are founded on equitable claims on the Plaintiff's part, which the law raises in his favour.

1. The Plaintiff may under this Count recover money paid to the Defendant, (*o*) where *the consideration for which he paid it has failed*, and for which the Defendant received it. (*p*) Thus, where money was paid by the Plaintiff to the Defendant, as the price of an Annuity granted to him by the Defendant, and the latter set the Annuity aside : the Plaintiff recovered back the money for it was unjust that the Defendant, should keep the money paid for the Annuity, when it had been set aside by the Defendant himself.

In such a case, it would be necessary for the Plaintiff to prove the execution of the Annuity Deed by the Defendant to him, by calling the subscribing witness : the payment of the consideration would be also necessary to be proved ; but that would appear by the consideration being

(*o*) 1 Esp. Dig. N. P. 2.

(*p*) 1 Term Rep. 732. 6 East. 241.

recited in the Deed and the Receipt indorsed, to which the Defendant's hand-writing should be proved. It would then be necessary to prove that the Annuity was set aside by the Court, and the Rule obtained by the Defendant for that purpose should have been produced, and Evidence given that it was obtained by him : this may be done by producing an Office copy of the Rule obtained, and the Affidavit on which it was obtained. It will appear, by the Rule being made absolute for setting it aside, that the Plaintiff could not recover any future arrears of the Annuity for which he had paid his money, and that Defendant therefore could have no title to keep it.

In settling the Evidence therefore, where the cause of Action arises from the consideration having failed on which the Plaintiff paid his money, the consideration must be proved; and in doing so, it must be observed, that if it was founded on any written contract or agreement, the writing must be produced and proved : if it was by parole only, it may be proved by a witness.

Thus, *e. g.* if the Plaintiff had paid to the Defendant a sum of money in the presence of a witness, in consideration of the Defendant's resigning to him a certain Place or Situation, but which it was found afterwards the Defendant would not be permitted to resign, or had no right to sell; the Plaintiff may recover his money back by calling the witness to the transaction, and showing that the Defendant had not put him into the possession of the Place for which he had paid his money.

But if the transaction arose on matter wherein there was *any written Instrument* connected with it, that Instrument must be produced.

As if the Plaintiff had discounted a Navy or other Bill for the Defendant, which turned out to be forged, and he brings his Action to recover the amount paid, (q) he cannot recover by parol Evidence, that there was such a transaction, without producing the Bill, or at least showing that it was lost. The course of Evidence therefore for the Plaintiff in that case, or in similar ones, necessarily is this : to produce the Bill : to prove that he received it from the Defendant for whom he discounted it, and that he paid him on that account £——. He must then prove that the Bill is forged, by calling witnesses who are acquainted with the character or hand subscribed to the Bill, or from some mark on the Bill which enables them to swear that it is forged. If it is a private person's Bill, persons acquainted with his character and hand-writing must be called. If it is a public document, it is proved to be a forgery, by calling a Clerk from that Office from whence the Instrument or Bill purports to have issued, whose business it is, to be acquainted with the signature of those whose department it is to sign such Instruments or Bills, or who are acquainted with the private marks affixed to them, which enables them to detect forgeries.

2. If a person has paid money to another *by mistake*, on discovering the error, he may recover it back under the Count for money had and received.(r)

Where the Action is brought to recover money so paid, (s) the Plaintiff must go into Evidence of the whole transaction, and the circumstances under which he paid it ;

(q) 5 Taunt. 488.

(r) 1 Esp. Dig. N. P. 3.

(s) 1 Term Rep. 343. 3 Maule and Selw. 344.

and it must be clearly made out, that the payment was made in consequence of the Plaintiff supposing something to have taken place, or some fact to have happened, which turns out to be otherwise than he supposed ; as if an underwriter supposing a Ship to be lost, on which he had underwritten a Policy, has paid as for a total loss, and she afterwards returns to Port ; he has a right to recover back his money, he having paid it under a belief that the Ship had been lost.

In this case as in the preceding one, where the demand is connected with any Instrument or Writing, it must be produced : it would therefore, in that case, be necessary for the Plaintiff to produce the Policy, to prove the adjustment of it, and the payment by him made thereon, as settled for a loss by perils of the Sea, and that he paid the amount to the Defendant.

The other grounds of Action, on this Count, will be found at length in all treatises on the laws of Nisi Prius. (*t*) It lies to recover back money extorted or obtained by oppression : paid to a person acting under a void authority : money embezzled or obtained by cheating, or given to be applied to an illegal purpose : in all these cases, the rules just laid down in the two instances given, are in every respect applicable ; that is, the whole transaction must be proved ; and if it has arisen from the intervention of any Instrument in writing, *it* must be produced and proved, as no parol Evidence of it can in such case be admitted.

One caution is, however to be strictly attended to in this Action ; (*u*) that it must appear that the Plaintiff did not

(*t*) Esp. Dig. N. P. 3. et ultra.

(*u*) 1 Esp. Dig. N. P. 119. 1 Esp. N. P. C. 279. 7. East. 269.

pay to the Defendant the money *voluntarily* ; as if he did, though he might have resisted the payment with effect, he cannot, after so voluntarily paying it, recover it back, for that would tend to circuity of Actions.

2. Of settling the Evidence on the general Count for money paid, laid out, and expended to Defendant's use.

The next head of Evidence respects this head, as to which the general rule just laid down with equal force applies ; that no man can, of his own head, pay money on the account of another, so as to make it a ground of Action, unless it has been paid at his request : by his direction : or is money which he is compellable by law to pay on Defendant's account, by reason of some legal proceedings, or some legal claim or demand, which he could not resist.

It will therefore not entitle the Plaintiff to recover in this Action, to prove a payment made by him on account of the Defendant ; he must go further, and show *a request, or order, by the Defendant to do so*, which may be done, either by a witness, or by writing.

Or he may give in Evidence, that he was *compelled by law to pay it*.

As where an under Tenant's goods are distrained on account of Rent due to the head Landlord, and to redeem his goods, he pays the rent in arrear ; on proving the distress made : (x) the taking of his goods : that it was

for Rent due by the Defendant, and that he to redeem his goods paid the Rent due by the Defendant ; all of which may be proved by the head Landlord, or the Broker he has employed : the Plaintiff may recover the whole money so paid.

Under this head falls the case of payment of money by *Sureties* for their Principal, as under Bonds or Recognizances. (y) A surety, who pays the whole sum for which he was jointly bound, may recover the whole against the principal, or a proportionate part from his co-security.

This head is more fully treated of *post*, pag. 70.

3. *Of the Evidence on the Count for money lent.*

It is necessary to observe on this Count, that the mere proof of the Defendant receiving a sum of money from the Plaintiff will not support this Count ; the money must be proved to have been advanced to him *as a loan*, for otherwise it is open to the presumption, that it was given for some other purpose. This is provable either by a witness, or by letter or other writing, or by a Promissory Note ; all of which are good Evidence under this Count, on proving Defendant's hand-writing.

4. *Of settling the Evidence on the Count for goods sold and delivered.*

To support this Count, as in the last, the proof of the

(y) Per *Buller*, J. 2 Term Rep. 105.

mere delivery of Goods to the Defendant by the Plaintiff, is not sufficient, without Evidence of a contract of Sale. To support this, however, the Plaintiff is not called upon to prove an actual bargain for the specific goods for which the Action is brought; it will be sufficient to prove a dealing in the way of the trade or business of the parties: as if a Factor delivers goods to a Defendant in which he deals as a merchant or shopkeeper, a sufficient presumption is thereby raised, that they were sold to him, and that he is liable; evidence therefore to that effect is sufficient: but if there is no such connection in their dealing, the Plaintiff must show an order or contract for them, as well as a delivery of them to the Defendant.

This is matter of Evidence as to the contract or order, and may be proved either by writing or parol; the fact of the delivery must be proved by witnesses, and the value of the goods delivered, by similar proof.

As it is essential to prove the delivery of the thing sold to the Buyer, (z) these points of Evidence are to be attended to.—1. A delivery to the Buyer himself, or at his own house, is in all cases sufficient.—2. A delivery according to his order is good if the order is produced or proved, and the delivery of the goods proved pursuant to it, as to be sent by a particular Stage coach or Wagon, or left at a particular place. (a)—3. Where the Buyer or Seller lives at a distance, and the former orders goods to be forwarded to him, it is implied that they are to be sent by the conveyance or carrier known to be so employed,

(z) 1 Esp. Dig. N. P. 18.

(a) Cowp. 294.

and the proof of the delivery of the goods to him is sufficient to charge the Buyer. (b)

This being a general head it may be proper to advert to—

The Evidence for the Defendant under the Action for goods sold.

The Defendant may, in answer to the Plaintiff's Action, show that the Goods were sold on credit, and that the Action was brought before the credit expired. To prove the commencement of the Action where he relies on this defence, he should have an examined copy of the writ, or the copy served on himself, or the writ itself; but if the suit was commenced by Bill, if the credit expired before Defendant filed it, it will be sufficient to entitle the Plaintiff to recover.

So the Defendant may give in Evidence, that the goods were not such as he had ordered, and that he offered to return them; that they were of inferior value to what they are charged; that they were damaged or worth nothing. This is matter of fact to be proved by witnesses.

5. Of the Evidence on the Count for Work and Labour.

In this case it has been laid down, that what is done by any one, in the course of his profession, trade, or business, is presumed to be done with a view to payment, and that the person doing it may recover an adequate compensation or reward: in such case it will be sufficient to show that

(b) 3 Bos. & Pul. 582. 2 Camp. 36, 639.

he was so employed, without proving any express promise to pay him ; but where what is done has no connection with the Party's business ; an express employment must be proved on the terms of being paid, the law being clear, that no man can make another his debtor without his consent, and that no man shall seek for payment for what he at first gratuitously undertook without the view of being paid for.

In settling the Evidence therefore on this Count where the work or labour done is connected with the Plaintiff's trade, profession, or business, he must prove of what trade, profession, or business he is, and the Defendant retained or employed him in it, and then prove the work and labour done, and that it was in a fit and proper manner, and then give Evidence of the amount of what he charges.

If it is not so connected with the Plaintiff's trade, profession, or business, he must prove that the Plaintiff retained, hired, or employed him, to do it, and that he did it in consequence under a contract or agreement to pay him, which may be proved by a witness, or by a writing in Defendant's hand.

And the Plaintiff must, lastly, prove what he deserves to have for his trouble. All these facts are provable by witnesses.

Of the Evidence on the part of the Defendant in this Count.

The Evidence which the Defendant may adduce to resist the claim arising from this Count (c) is, that what was done

(c) 1 Esp. Dig. N. P. 108. 2 Stra. 728.

was done gratuitously, out of kindness, or with a view to a legacy or future service which Defendant might render to the Plaintiff; this Evidence is an answer to it. So the Defendant may reduce the demand by counter-Evidence of overcharge by Plaintiff, by showing what Plaintiff was fairly entitled to. These facts may be proved by witnesses, letters, or the Defendant's admission.

6. *Of settling the Evidence on the Count upon an Account stated.*

This does not suppose a regular statement of demands between the Plaintiff and the Defendant, and a balance struck in the Plaintiff's favour: any Evidence of an admitted balance, where there have been mutual demands, either by parol or by writing, is quite sufficient to enable the Plaintiff to recover, though different from the sum stated in the Declaration.

This is, however, to be taken to be the case where the Plaintiff's case is on the common Count in the general form, viz. "that the Plaintiff and Defendant accounted together, and the Defendant was then found in arrear, and indebted to the Plaintiff in a large sum of money, *to wit*, the sum of £——," where the sum is laid under a *videlicet*; but if the Count was on an account stated between the Parties, wherein the Defendant was found in arrear, and indebted to the Plaintiff in the sum of 20*l.* *e. g.* (d) and then state, a promise to pay in consideration of forbearance, the exact sum must be proved, or the Plaintiff

(d) 3 Maw. & Selw. 173.

will be non-suited. In settling the Evidence, therefore, this distinction is necessary to be attended to.

3. I shall now proceed to the third head of this Chapter, and consider the Evidence in cases of Assumpsit, connected with the Person as standing in some degree of relation to others, or in a representative character, and how the Evidence in those cases is to be settled.

1. *Of settling the Evidence in the case of Sureties, or Co-Bail.*

If a Surety, or Co-Bail, is compelled to pay the whole Debt for which he became bound with another, he may call on the Principal to repay him the *whole* or for *contribution from his Co-Surety or Co-Bail*; that is, if two only were joined in that security, for a moiety of the sum paid; if three, for a third each; and so in proportion where there are more joined. (e)

In such Action, the form of which is Assumpsit for money paid to the Defendant's use, the Plaintiff must give in Evidence the original security by which he became bound with the Defendant; if by Bond, it must be produced and proved to have been executed, by the Defendant and himself, by the subscribing witness; and if by Recognizance, it must be produced and proved. When the Bond or other Security is so proved, and it is read in Court, the sum in which the Parties were bound appears: the Plaintiff must then prove that he was called upon by the obligee of the Bond, or the Plaintiff or Sheriff, in the case of a Bail-

(e) 1 Esp. Dig. N. P. 5. Per Buller J. 2 Term Rep. 105.

Bond or Recognizance, and compelled to pay the whole Debt. For this purpose, he must show, that payment was either demanded of him, or enforced ; which may be done by giving either parol or written Evidence of the *demand* made on him in consequence of which he paid ; for he cannot voluntarily and uncalled on pay the Debt for which he had bound himself ; where he has been called upon, it is always advisable to give notice to the Principal, or his Co-Surety, or his Co-Bail in the first instance, either to pay or resist the demand, and he should be prepared with Evidence of his having done so : but though advisable, it is not necessarily required to give him a title to recover. In this case, the obligee of the Bond, or Plaintiff in the Action on the Bail Bond, are good witnesses to prove his payment of the whole sum in which he was bound with Defendant.

2. *Of settling the Evidence in cases of Landlord and Tenant.*

The principal cases in Assumpsit, in addition to that for Use and Occupation, already treated of, are,—1. Such as arise on the Covenants of an expired Lease, or,—2. For not using the land in a Husbandlike or Tenantlike manner.

1. Where there has been a Lease containing Covenants of any description, which has expired, and the Tenant continues to hold as before, he holds subject to all the Covenants contained in the Lease ; and the observance of them is enforced by special Action of Assumpsit, stating the

breaches in the words of the Covenants in the original Lease. (*f*)

In such case, the Plaintiff must produce and prove the execution by the Defendant of the original Lease, by calling the subscribing witness ; the term being mentioned in it, it will appear by the date, that it is expired, and the Covenants on which breaches are assigned should be read from it : the Defendant must be proved to have held and enjoyed the Premises under the original Lease, and to have continued in possession after it was expired. The Plaintiff must then call witnesses to prove the breaches assigned, and the extent of the injury as damages ; as, for example, if it was for not repairing, by a witness who proves the state of the Premises, and what sum it would take to put them into repair.

If the Action is against the Tenant for not using the Land in a Husbandlike way, that is matter of Evidence governed by the custom of the country where the Land lies, and what is deemed good Husbandry : (*g*) for this purpose, the Plaintiff must prove, that the Defendant was his Tenant, and call witnesses to prove in what manner he has treated the Land while he occupied it. He must then call persons of skill and experience who are to speak to what is good Husbandry, and whether what the Defendant has done, is contrary to it ; and, lastly, prove the extent of the damage.

(*f*) Esp. Dig. N. P.

(*g*) Esp. Dig. N. P. 303. 5 Term Rep. 173. 4 East. 154.

3. *Of settling Evidence for the Plaintiff in the cases of Persons connected with the Church, or Ecclesiastical demands. Such as Parsons or Vicars, Curates, Churchwardens, or other officers.*

1. *Of Parsons or Vicars.*

These Actions are,—1. For dilapidations, which a Rector or Vicar, on coming to a Living, is entitled to recover from the former Incumbent, if living, in whose time the dilapidation took place, or from his representative, if he is dead. (*h*)

In support of this Action, the Plaintiff must prove his title to the Living, by giving in Evidence his presentation, institution, and induction into it; but to fix the Defendant as late Incumbent, or his Representative as liable for the dilapidations, it is only required to show his acts; such as receiving the Tithes, or Living in the Parsonage House. (*i*) The Plaintiff must then prove the state of the Premises, and that they belong to the Living or Parish, and are dilapidated and out of repair; and, lastly, the amount of the damages.

2. For subtraction of Tithes, upon which, however, it should be observed, that the form of Action is not Assumpsit, but Debt under Stat. 2 and 3 Ed. 6. ch. 13. (*k*)

Where the Parishioners, among whom is the Defendant, have recognised the Plaintiff as their Parson or Vicar

(*h*) 3 Lev. 262. 2 Rep. 630.

(*i*) 3 Term Rep. 634.

(*k*) Vid. 4 Mod. 422. 4 Term Rep. 367.

by paying him Tithes on any occasion, (*l*) if he is afterwards obliged to sue them for subtraction of Tithes, Evidence of such former payment or settlement is sufficient. But it should seem, that if a new Incumbent who has never received Tithes nor any dues in that character, is obliged to sue for subtraction of Tithes, that he must prove himself regular Incumbent of the Living, by the same Evidence as is above stated.

Having established his title by such Evidence to the Tithes, the Plaintiff must then prove the Defendant to be in possession of the Lands, for the subtraction of the Tithes of which the Action is brought : that they lie within the Parish ; that there was a crop grown on them of Corn or Hay, or the like, which was cut and carried by the Defendant, without the setting out or leaving of any Tithes ; and he, lastly, must prove the single value of those carried away, which being established, he will be entitled to a verdict for the triple value ; all this is to be proved by the *vivâ voce* Evidence of Persons acquainted with the Parish, and the Land held by the Defendant.

The Evidence for the *Defendant*, in this case, may be to *show*, that there was a *modus* existing in the Parish of a money payment in lieu of Tithes, which warranted him to remove the whole of the crop.

3. An Action of Assumpsit will lie by the *Curate* of a Parish against the Incumbent who gave him a title to be ordained, though he has been dismissed by that Incumbent from doing the duties of the Church. (*m*)

(*l*) Per Lord *Kenyon*, 3 Term Rep. 635.

(*m*) *Martyn v. Hynde*, Dougl. 137.

The Evidence for the Plaintiff, in this case, is the letter of recommendation in the common form addressed to the Bishop by the Incumbent of the Plaintiff: this is proved by the production of the letter itself by the Officer of the Bishop, and proving the hand-writing of the Defendant subscribed to it. It will be then necessary to prove, that the Defendant is then Incumbent of the same Parish, and that the Plaintiff had offered to do the duty.

The damages are the amount of the *Curate's* stipend.

4. *Of the Evidence in Actions by or against Churchwardens.*

As the property of personal things belonging to the Church is in the Churchwardens, they may bring Actions in their own names for them, or be sued for repairs done to the Church or Churchyard. In both cases, their appointment should be proved: this being by order of Vestry, the Vestry book containing their appointment should be produced by the Vestry Clerk, as the Person having charge of it.

If, however, they have given orders for any thing to be done in their character of Churchwardens, to the Church or Churchyard, it will be sufficient to prove the order so given; and it seems doubtful whether the general Evidence of their being Churchwardens, and acting as such, would not be sufficient in all cases.

5. *Of the Evidence in case of Factors or Agents.*

1. *In the case of Factors.* (n)—If a Factor buys or sells goods, though they are known to be sold or bought on account of others, he may maintain an Action, or be sued in his own name.

The only points on which any question of Evidence can arise, are,—1. Where the Factor sues for the price of goods sold by him, (o) the Defendant may answer the Action by showing, that the payment for them was stopped in his hands, by the owner of the goods giving him a notice to retain the money; for that purpose, the Defendant must call witnesses to prove, that the goods claimed were the goods of such Person, and by him sent to the Plaintiff to be sold: for which purpose, the Plaintiff should have notice to produce the Invoice, or Bill of Parcels, sent by such Person with them to him as a Factor. The owner cannot be a witness for this purpose, as he is interested in stopping the money in the Defendant's hand; but it may be done by his Clerk or Servant proving the sending or shipping them, and calling the Persons from the Wagon or Wharf to prove the delivery of them to the Plaintiff, or by a witness who knows them, and has seen them in Defendant's possession. The Defendant must then prove a notice to him from the owner, either written or verbal, not to pay over the proceeds to the Plaintiff, the Factor, he being the principal; if it is in writing, his hand must be proved; if it is verbal, it is proved by a witness who heard it. But this notice is only available where the owner is not

(n) 1 Esp. Dig. N. P. 129.

(o) 2 Stra. 1182. Bull. N. P. 130.

indebted to the Factor. (*p*)—2. To a similar Action, by the owner of the goods for the price, after such notice against the buyer from the Factor; the Defendant may set up as a defence, that the Factor was indebted to him, and that he sets off the price of the goods against the debt so due to him. In this case, the Defendant must,—1. Prove that the Factor was indebted to him.—2. That he bought the goods from the Factor, not knowing them to be another's, but considering them as his own. This latter piece of Evidence being, however, negative, it may be disproved either by production of the Bill of Parcels from the Factor, in which the goods are described as the Plaintiff's, or by calling the Factor himself; for, in this case, he has no interest; being either indebted to the Plaintiff, in the price of the goods, or so much of his debt to the Defendant being left undischarged, he can prove the whole transaction.

3. Every Factor is bound to sell according to the usage of the trade; (*q*) if for ready money, for ready money; if on credit, on the usual credit; (*r*) not to sell to Persons notoriously of bad character: and to sell, not to pledge. If he fails in any of these respects, he is liable to an Action for breach of his duty.

Such action, however, cannot occur where the Factor sells under a *del credere* commission, because he is then liable in his own person; but if he sells, and makes returns of sales, to buyers of no credit, and who, when applied to, cannot pay; if he sells at a longer credit than is warranted

(*p*) Ibid. Cowp. 251. 7 Term Rep. 359.

(*q*) 1 Esp. Dig. N. P. 131.

(*r*) Cas. K. B. 514.

by the usage of Trade, or if the owner applies to have his goods returned, and he finds the Factor has pledged them, he may maintain an Action against him: the last of these cases is, however, the object of an Action of Trover against the Person who has got them.

The evidence, however, in these Actions is necessarily different, and must be attended to.

The Defendant's (the Factor's) own return of sales is the groundwork of all these Actions; and the Plaintiff must prove that he received it from the Defendant by proof of his hand-writing, or otherwise.

If the Action is for selling them to an improper Person, it will not be sufficient for the Plaintiff to show that the buyer was insolvent when the money was to be paid, if he was in good credit when the goods were sold; he must therefore apply his Evidence to that period. He should show that he was at that time in bad credit, as that he had been a Bankrupt; or compounded with his creditors a short time before; or that no one would deal with him: these are matters of fact not requiring the strict proof of Bankruptcy or the like, but are matters of reputation to which witnesses may give Evidence from their knowledge of the particular fact, as, *e. g.* by a witness who proved a debt under his Commission. The Plaintiff must then prove a demand of payment for the goods from the Person mentioned as the buyer, at the regular time of payment expired, and that he was not paid: that is sufficient for the Plaintiff's case.

If the Owner's complaint is for selling at too long a

credit: he may maintain an Action against the Factor, after the time of the usual credit is expired.^(s) What is the time of usual credit, is matter of Evidence which the Plaintiff must prove, by calling Persons in the trade, and acquainted with the usual and regular credit, and then showing by production of the Defendant's return of the Sales, proved as before-mentioned, that the goods in question were sold at a longer credit, and he will be then entitled to recover.

If the Owner's Action is for pledging his goods, that fact may be proved by calling the Person to whom he has pledged them, or by other proof.

2. *In the case of Agents.*^(t)—Agents as such may maintain Actions in their own names, as in the case of Auctioneers. A Factor is in fact an Agent, and the law as to Agents generally, for the most part is the same. The only case of most importance, under this head, is where the Agent is sued and seeks to protect himself under his representative capacity; when sued therefore in his own name, he may set up and prove, that he was an Agent merely under the following circumstances:—

If an Agent is sued for money received by him, in fact not on his own account,^(u) he may give in Evidence: that he was known to the Plaintiff to be an Agent only for another, and that the Plaintiff paid the money to him voluntarily for the use of his Principal, or even by mistake for the same purpose,^(x) and that he has paid it over to his

^(s) 1 Camp. 258.

^(u) 4 Burr. 1985.

^(t) 1 Esp. Dig. N. P. 132.

^(x) Cowp. 565.

Principal without any notice to retain it before Action brought : with this Evidence the Plaintiff cannot recover.

In that case, the payment of the money to the Defendant is the Plaintiff's Evidence ; and the Defendant must then show, if it does not come out from the Plaintiff's witnesses, that it was not paid to him on his own account, but for his Principal. He must then show an actual payment over of the money to the Principal before Action brought, or any notice given to retain it : for his giving his Principal credit in account for it, or in his books, will not discharge him.(y) He should then either prove payment to the Principal by calling the Principal himself, or a witness who saw the payment, or by the Principal's receipt.

In general, where in other cases a man is known to have been an Agent only, and he gives up his Principal, the latter ought to be sued, unless the Agent has by some Act or declaration taken a responsibility on himself.(z)

Where the Principal is sued on some contract made by his Agent,(a) the Plaintiff must establish the fact, that he was Agent, clear of all doubt ; and any Letters or Declarations of the Agent are inadmissible as Evidence. He must be either called himself, or some Person who can prove the employment, either by knowing the fact to be so, or by the Defendant's admission of it ; and where the agency is established, the Defendant may in answer show,—1. That the Agent was not a general Agent, or authorised in the particular transaction to act to the extent

(y) Cowp. 3 Maw. & Selw. 348. (z) 15 East. 64. 1 Campb. 85. 109

(a) 1 Esp. Dig. N. P. 132.

he did ; for unless the Agent is a general one, or so authorised, he cannot bind his Principal.(b) A special Agent is bound to act within the scope of his authority ; as if a Broker is authorised to buy one kind of silk, and he buys another, the Principal is not bound ; (c) but if the authority of the Agent is not circumscribed, the Principal shall be bound.—2. The Principal may show that the Plaintiff trusted the Agent ; gave him time for payment without acquainting the Principal, and that shall discharge him. As the authority to the Agent may be by letter or by parol, the defence is proved accordingly.(d)

6. *Of the Evidence in Actions by or against the Owners of Ships.*

The property in Ships being regulated by the Statute of 26 Geo. III. c. 60. s. 66. and 34. Geo. III. c. 68. s. 11., with respect to their being duly registered ; in all Actions, by Ship Owners, that must be strictly attended to when it is necessary to go into Evidence of strict property in a Ship.

1. Actions of Assumpsit against Ship-owners are principally for repairs done to the Ship, for Seamen's wages, or for negligent carrying of goods ; in such Actions, where there are many Defendants on the Record sued in that character, their joint liability in this as in every Action, founded on contract, must be made out.(e)

For this purpose, if a defendant is proved to have acted

(b) 3 Term Rep. 763.

(c) 1 Esp. C. N. P. 111.

(d) 3 East. 147.

(e) 1 Esp. Dig. N. P. 133.

as Owner, or has represented himself as such, has given directions respecting the voyage to the Master, or given orders for any thing to be done connected with the Ship, no further Evidence is necessary to fix him as the Owner.

But if others are joined with him who have done no act, or appeared as Owners, they are fixed with demands connected with the Ship; first, by producing Evidence of the Ship's Register, in which their names appear. This is had from the Ship's Registry Office at the Custom House, from whence the original Register will be produced.

But this Register alone, or even though accompanied with the Affidavits of other part Owners, swearing that they, and the Person sought to be charged as a part Owner, were the Owners of the Ship, (f) will not be sufficient Evidence to fix such Person, without further proof that he assented to the Register, or in some way recognised it. This proof may be had by some Evidence of his representing himself on any occasion to be so, by proving his hand-writing subscribed to the Register, or by any act done by him, or order given, in the character of a part Owner.

This Evidence, which is composed of written and parol Evidence, is indispensable in every case to establish the Defendant's liability in the character of Ship-owner, who is sued as such for any demand connected with the Ship; that is, therefore, the first piece of Evidence in all Actions against them.

(f) 14 East. 226. 2 Taunt. 5. 2 Campb. 170.

The rest of the Evidence depends upon the nature of the Action ; if it is for repairs done to the Ship, and the declaration for work and labour, the Plaintiff must prove the orders given by the Defendant, or the managing Owner, or by the Master, what was done, and the amount of it. This is done by the testimony of witnesses.(g)

If it is an Action for *Seamen's Wages* earned on board the Ship, the Declaration is for work and labour generally, even though the Seamen has signed Articles under Seal, and bound himself, to serve for the Wages set opposite to his name. And the Stat. 2 Geo. II. c. 35. enacts, that all articles between the Master or Mariners for foreign voyages shall be in writing ; that no obligation shall lie on the Seamen to produce them ; nor shall he fail in any Action for the want of the production of them.

The course of Evidence, therefore, at *Nisi Prius*, in these cases, is for the Plaintiff to call for the Ship's Articles, which the Defendant is bound to produce, though no notice has been given to do so ;(h) when produced, they show the rate of Wages at which the Plaintiff served, and he is then called upon to prove the length of time which he served on board, which must be to the end of the voyage : this is usually done by some of the Crew who served with him.

This Statute, however, applies to British not to foreign vessels, and the Statute mentions foreign voyages only.(i) In the case therefore of Suits for Wages on board foreign

(g) 1 Term Rep. 73.

(h) 2 Campb. 315.

(i) 3 Campb. 290.

vessels, the Plaintiff must prove the hiring, the rate of Wages he engaged at, or if he has no Evidence of that, the rate of Wages paid to others, serving as he did, and the length of service, which will be sufficient.

It should, however, be observed, as a proper caution to the Plaintiff's Attorney in practice, to take out a Summons, and procure a Judge's Order for the sight, perusal, or a copy of the Ship's Articles, as they often will be found to contain Covenants or Agreements between the Master and Crew, which may defeat the Plaintiff's Action. But, in every instance, the Plaintiff should be prepared to prove, that he served till the conclusion of the voyage; as if Defendant proves that he left the Ship, or deserted before that time, he cannot recover. So the Defendant may prove that the Ship was lost, which equally deprives him of any claim for Wages.

If the Action is against the Defendant, as Owner, *for negligence*, the Plaintiff should prove the Shipping of the Goods, the injury which they suffered, and show that it arose from negligent stowage: such as the want of sufficient dunnage, or the Ship not being waterproof: and the amount of the damage; and it will be always requisite clearly to show the cause of injury, and connect it with the Ship.

2. The principal Action, *by Ship-Owners*, is for Freight, or charges for the Shipping of Goods, or on Policies of Insurance.

When the Plaintiffs sue as Ship-owners, for Freight, Insurance, or such like demands, they must prove them-

selves invested with the full legal Ownership required by the Statutes before-mentioned.

The regular mode to do so is as before-mentioned, viz. by the production of the Register and Certificate of Register from the Custom House, and proof of the names of all the Parties, Plaintiff appearing as such, and some Evidence of their acting as Owners. This is decisive; but general Evidence of Ownership, unless it is contested, will otherwise be sufficient at first. But it is perfectly clear, that if any Persons declare as joint Owners of a Ship,^(k) and the Defendant gives the Ship's Register from the Custom House in Evidence, and the name of any of the Plaintiffs is wanting in it, that the Plaintiffs must be nonsuited; for unless the Owner's name appear in the Ship's Register, &c. he is not a legal owner, and therefore can maintain no Action.

Having, however, first established a legal Ownership, if they sue for *Freight*, they must prove the Charter-party or Bill of Lading if any, or the hiring of the vessel for a particular voyage or time; the sum to be paid either by agreement, or on a *quantum meruit*; and prove that she performed the voyage or service, and that the goods were delivered to the Defendant, and the amount of the demand.

If the Action is for Freight on a Charter-party of affreightment not under Seal, between the Plaintiff and Defendant, no proof of Ownership is required, the Defendant having contracted with the Plaintiff in that character;

(k) 5 Term Rep. 709.

in that case, therefore, the Plaintiff must prove the Defendant's signature to the Charter-party, and that the voyage was performed: the rate of payment being established by the Charter-party, it ascertains the amount of the damages. The performance of the voyage may be proved by the Master, or any one who sailed on the voyage; and any Person who is proved to have received the goods under the Charter-party, whether he is the Person named, Consignee, or Indorsee of it or not, is liable to the Action for Freight. The Plaintiff therefore must prove the delivery of the Cargo to the Defendant pursuant to the Charter-party, which is sufficient; but he must be proved to have received it under it, or on his own account.^(l)

If the Action is for a loss on a Policy of Insurance, the Evidence to be produced is as before stated, page 35.

7. *Of the Evidence in Actions by or against Partners.*

1. In Actions brought *by Partners*, to recover a Partnership demand or claim, ^(m) it is indispensable that all should join and appear as Plaintiffs on the Record; for if it comes out on the Trial, that any one is omitted, it is a decisive ground of Nonsuit, though the Plea is the General Issue.

The Plaintiffs, therefore, must always be prepared with Evidence of their Partnership, ⁽ⁿ⁾ and, that all those whose names are on the Record, are Partners in the demand, or

^(l) 13 East. 399. and 1 Mau. & Selw. 157. 2 Mau. & Selw. 303.

^(m) 5 Term Rep. 709.

⁽ⁿ⁾ 3 Campb. 329.

concern, for which the Action is brought : this is done by many ways ; as, by producing the Partnership Deed, and proving the execution of it, by all the Plaintiffs ; by the Evidence of the Solicitor employed for the Firm, and who knows who compose it ; by the Evidence of a Clerk employed by them, or by any Person who has dealt with all in that capacity.

An exception is, however, to be observed to this rule, requiring such Evidence of the Partnership ; that is the case, where the Defendant *pays money into Court*, for he by that admits a contract made, with those whose names appear as Partners, and he cannot controvert it by Evidence.

2. If the Defendants *are sued as Partners* (o) the Plaintiffs must prove, that all the Persons whom he has made Defendants on the Record, were jointly concerned in the demand, or concern, in which the Action is founded. If they appear as Partners to the world, and carry on trade, or any concern, under a joint Firm, on giving Evidence, that they do so, they constitute that Firm ; it will be sufficient for the Plaintiff to show that fact, and then the act of one of the Firm will bind them all, if the demand is connected with that business which they so carry on together. If, however, there is a dormant Partner, whose name may be covered under the word *Co.*, or who shares in the profits of the Trade, or concern, though the word *Co.* be not used, and his name does not, in any way, appear, or any Person who may have joined in that which is the ground of Action : if he is made a Defendant, the

(o) Bull. N. P. 179.

Plaintiff must give distinct Evidence as to him, and show, that he had such an interest as constituted him a Partner, or that he is jointly interested in the particular matter which is the subject of the Action. This is to be done by *viva voce* Evidence of Persons acquainted with the Defendants, and their course of dealing, or with the particular transaction in question. Under this head, of settling Evidence, it must not be forgot, that if the Action is joint against many Defendants, the Plaintiff must prove, by distinct Evidence, that every Defendant on the Record was concerned in that which is the subject of the Action; and if he fails to fix any one of them by Evidence, he must be nonsuited, for then the contract proved, will be different from that declared on.

But, though there may be many more Partners or Persons concerned in the transaction on which the Action is founded, than those who are sued, and appear as Defendants on the Record, and that should appear in Evidence on the Trial, the Plaintiff will, nevertheless, be entitled to a Verdict, provided he fixes those by Evidence whom he has made the Defendants; (*p*) for, if they meant that the others should have been joined, they could only avail themselves of that circumstance by a Plea in Abatement.

If there is a Plea in Abatement, “that others ought to be joined,” the Plaintiff may reply, that the Defendant undertook solely, and not with others; or he may deny the Defendant’s Partnership with the others, whom it is pleaded ought to be joined. In this latter case, the Issue lies

(*p*) *Rice v Shute*, 5 Burr. 2611.

on the Defendant, and he must prove a Partnership, as before observed, in the case of Plaintiff's Partners. If the Plaintiff relies on the cause of Action being the Defendant's only, the Issue lies upon him, and he must prove it, by showing, that the Defendant alone contracted with him.

If the Defendant plead Partnership, and he has, in fact, no ostensible Partner ; so that, if the Plaintiff were to submit to the Plea, and enter a *cassetur billa*, he would, in another Action, be under difficulties to fix such Partner. It is, therefore, better to reply the sole undertaking and liability of the Defendant on the Record ; in that case, it will be good Evidence, if the Action be for goods sold, to show by witnesses, that the Defendant ordered the goods, that no other Person was ever seen, or known, to act as a Partner.

There is no mistake into which I have found those in Practice so often fall, as the not distinguishing the cases, where the Evidence at Nisi Prius implicates more Parties than appear on the Record. The Rule is this : if it appear, by the Plaintiff's own showing, or by Evidence adduced by the Defendant, that the *Plaintiff* has a Partner, or Partners, or that there was any other Person jointly interested with the Plaintiff, and his or their names do not appear on the Record, the Plaintiff must be nonsuited ; for he ought to state truly with whom the Defendant's contract was made, by stating the names of all concerned, and their joining in the Action ; otherwise, the contract proved by Evidence is not that declared on.

But, if it appear at the Trial, that the contract stated, was with the Defendant, and others who are not made

Defendants, this shall not affect the Plaintiff's right to recover, if there was no Plea in Abatement, but he may recover against those who appear as Defendants on the Record.

Of the Evidence for the Defendant.

If there are any number of Partners in Trade who are sued jointly, for Goods which appear to have been ordered in the way of the Partnership Trade, or Bills accepted apparently connected with it; the Defendant has no way of defending himself, but by showing, that the transaction was not a Partnership one, but for the benefit of one or more of the other Partners, and that fact known to the Plaintiff.

As, *e. g.* if an Action was brought on a Bill of Exchange, bearing the acceptance of the Firm, which, by law, any of the Partners may do on the Partnership's account; any one of the Firm may plead *Non-Assumpsit*, and show by Evidence, that the Bill was not for the Partnership's use, but for the sole account of another Partner, or Partners, and that the Plaintiff, when he took the Bill, knew the fact to be so; proof of these facts is indispensable, on account of the legal right which any Partner has to bind the Firm, and the Bill on the face of it would purport to be for the Partnership's use. This is matter of *vivâ voce* Evidence; but as most of these cases are matters of collusion between the Plaintiff and some of the Partners, in almost every case it is necessary to have recourse to a Bill of Discovery as the only mode to get at the truth.

8. *Of the Evidence in Actions by, or against, Assignees of a Bankrupt.*

This head of Evidence underwent a considerable change since the passing the Act, 49 Geo. III. c. 121. S. 10., by which, whether the Assignees are Plaintiffs or Defendants, the production of the Proceedings under the Commission are made Evidence ; that is, the Depositions, as to the Trading, Petitioning Creditor's Debt, and Act of Bankruptcy, made before the Commissioners, are declared to be sufficient Evidence of those matters, unless the Party is called upon by the other side to prove them at the Trial.

1. This is done by a notice served on the opposite Attorney, requiring him to prove all these matters, or any of them. If the Defendant calls upon the Plaintiff to do so, he must give that notice before he pleads ; if the Plaintiff calls upon the Defendant to do so, it must be before Issue joined.

When, therefore, the Assignees are required to prove every step of the Bankruptcy, and, which is necessary to invest them with the character of Assignees : They must prove that the Bankrupt was a Trader ; this is done by a witness acquainted with the business which the Bankrupt followed before he was declared Bankrupt. The next step is, the petitioning Creditor's debt. That may be done either by written Evidence ; such as by a Bill of Exchange, or Promissory Note, on which the Bankrupt's name appears, and proving his hand-writing, as before directed, in Actions on Bills of Exchange : by his Bond, or Warrant of Attorney to confess a Judgment, the exe-

cution of which, must be proved by the subscribing witness, if there is one to it; so it may be proved to be for goods sold and delivered to him, while in Trade, by the Evidence before-mentioned, (page 66.) on the count for goods sold; so for money lent; and it may, lastly, be proved, by giving Evidence of an acknowledgment by the Bankrupt, that he was indebted to the Petitioner, in a sum of 100*l.* or upwards; but this must appear to have been made before the Act of Bankruptcy. (*q*)

The next step is, an Act of Bankruptcy: as these are many; it is proved by the *vivâ voce* testimony of a witness swearing to the fact, necessary to constitute an Act of Bankruptcy; such as, of the Bankrupt being denied to a Creditor *e. g.*: and, in this case, the Bankrupt's declaration of his situation; as, that he went out of the way to avoid his Creditors, or was denied to one, because he could not pay, is good Evidence.

The last proof, is the execution of the Assignment of the Commissioners, by the subscribing witness. This is now seldom required.

This is the strict proof, required in cases of Actions by the Assignees; and they are bound to do it, if called on, with this exception, that if the Defendant has been employed by them, as Assignees; (*r*) as, for example, to sell part of the Bankrupt property, he cannot call upon the Assignee, to prove the Commission, as in other cases; for having dealt with them in that character, he cannot afterwards dispute it. (*s*)

(*q*) *Dowton v. Cross*, 1 Esp. N. P. C. 168.

(*r*) 1 Barn. & Ald. 677.

(*s*) 1 Esp. N. P. C. 342.

But, where notice has been given, of disputing the Commission, or any part of it ; the Party giving the notice must be prepared to prove the giving of it, by the witness who served it on the opposite Party.

2. If the Commission is not contested : the Depositions are produced by the Solicitor under the Commission. The opposite Party may require any Deposition to be read, and is at liberty to object it, as it appears on the face of the Proceedings, or to bring Evidence to disprove it, for it is not to be taken to be conclusive ; (t) as, for example, if the Bankrupt was found to be a Trader, and it appeared on the face of the Proceedings, that he was a Farmer, and bought, or sold, nothing but for the use of, or produce of, his Farm, the Party may object, that this does not establish a Trading within the Bankrupt laws.

So, if the proceedings found him a Bankrupt by reason of 100*l.* being a supposed debt to A. B., the Party may call witnesses to prove that debt was paid before the suing out of the Commission, so that there was no legal petitioning Creditor's debt, to support the Commission ; for, the Proceedings, when produced, are only *primâ facie* Evidence of those matters declared to be so by the Statute.(u)

3. *As to the vivâ voce Evidence, admissible in this case, these points are to be observed in settling the Evidence.*

1. *The Bankrupt, or his wife, are inadmissible wit-*

(t) 3 Campb. 424.

(u) Bull. N. P. 43. 2 H. Bl. 279. 2 Stra. 829. 5 Esp. N. P. C. 22. Same, 187. 1 Selw. N. P. 239.

nesses to prove any fact in support of the Commission: but having obtained his Certificate, and released to his Assignees the allowance given by Statute, he may be examined, as a witness in support of any Action, brought to recover any part of his property by his Assignees; and without having obtained his Certificate, he may be called as a witness against his Assignees, in questions respecting his property; as, for example, if his Assignees sued a Person on a Bond made to the Bankrupt before his Bankruptcy, the Defendant may call him to prove it paid, though he has not got his Certificate.

2. *A Creditor*, whether he has proved his debt under the Commission or not, is an inadmissible witness, either to support the Commission, or the demand. (x)

But he may be made competent by a Release of his debt, or having sold his dividend.

But a petitioning Creditor may be a witness to defeat a Commission, or to disprove the amount of his own debt, but not to support the Commission. (y)

And note, that if it is a joint Bankruptcy, there must be distinct proof of the Bankruptcy of each—and these further matters of Evidence on the part of the Plaintiff are to be attended to.

4. As the Bankrupt, when Defendant, by the bare production of his Certificate, establishes his defence by its be-

(x) 2 Camp. 301. 2 Ves. & B. 177. 1 Rose, 392. in Not. 2 Black. 1273.

(y) 2 Camp. 412. 1 Stark. 40.

ing a *prima facie* answer to the Plaintiff's case, the Plaintiff can only succeed, by going into Evidence, to establish some one of the following points, by which the operation of the Certificate is defeated ;—(z)

1. He may show the Certificate to be void, by reason of the Bankrupt having given, on the marriage of a child 100*l.* unless he had then sufficient to pay his debts.—2. That he has lost, in one day 5*l.* or 100*l.* in twelve months before his Bankruptcy, by gambling, or playing at the games mentioned in Stat. 5 Geo. II. c. 30. or by stock-jobbing ; that he has done so is matter of *viva voce* Evidence, by calling, as witnesses, the Persons who have played with him, or seen him lose the money, or pay it on any of these accounts. This was done with effect in the case of *Bateson v. Hartsink*, 4 Esp. N. P. C. 43. Or that it is void under the Stat. 24 Geo. II. c. 57. s. 9. by the Bankrupt's fraudulently permitting proof of debts, under his Commission, by Persons to whom he was not indebted in the sums so proved, and that they have signed his Certificate : to do this, the Persons themselves may be called, or it may be proved, by collateral Evidence, that they were not Creditors. This was done, and the Certificate avoided in a case of *Edmonstone v. Webb*, 3 Esp. N. P. C. 264.—3. The Plaintiff may show, that the Bankrupt had been so before, or compounded with his Creditors, and that the Certificate produced, being under the second Commission, that he had not paid 15*s.* in the pound. (a) To establish this, the Plaintiff should produce the Commission, or Proceedings under it. (b) If that Evidence

(z) 1 Esp. Dig. N. P. 192.

(a) 5 Term Rep. 287.

(b) 3 Esp. N. P. C. 195.

cannot be had, there should be a *subpœna duces tecum* to the Secretary of Bankrupts, or the proper Officer, to produce the Document, or Entry, from the Bankrupt Office, of the issuing of the first Commission : if he compounded with his Creditors, or Creditor ; any other witness may prove the fact. (c) So, if it was by Deed, the Deed should be produced, and proved, by the subscribing witness. But the Composition with Creditors, which is required, must be a general Composition with all the party's Creditors, and for his own separate Debts, not for those of a Partnership. (d) The Bankrupt, by the production of the Certificate, admits the issuing of the second Commission, and it lies upon him to prove that he paid 15s. in the pound.—4. The Plaintiff may, lastly, show, that the Bankrupt gave money to some of his Creditors to induce them to sign his Certificate, for this renders it void. (e) This may be proved by the Person who had the money, or by any witness who knows of it.

2. If the Certificate has been regular, the Plaintiff may, notwithstanding the Debt was prior to his Bankruptcy, give in Evidence a promise made by the Bankrupt to pay it since he became Bankrupt, for that will bind him. (f)

This promise may be proved either by letter, or by a witness who heard the Bankrupt make it ; the witness must be accurate as to the time when it was made, so that it should appear to have been made after the Bankruptcy. The same accuracy of proof must be attended to, if it has

(c) 1 Bos. & Pull. 467. 16 East. 225. 3 Bos. & Pull. 185.

(d) 15 East. 619.

(e) 15 East. 248.

(f) 1 Esp. Dig. N. P. 193. Cowp. 544.

been made by letter ; and the Bankrupt's hand-writing must be proved.

In addition to which, it must be observed, in settling the Evidence, that the proof must be of an absolute promise to pay, not of a conditional or qualified one.(g)

3. The Plaintiff may show, from the nature of his demand, that it was not proveable under the Commission, for to such only the Certificate is a bar ; such as that it did not arise, *ex. gr.* until after the Bankruptcy. That is a matter of fact to be proved by Evidence and dates.

9. *Of the Evidence in Actions of Assumpsit by, or against, Executors or Administrators.*

In this, as in every case, in which a Plaintiff sues in a representative capacity, he must show himself to be completely invested with that character. The power of the Executor is derived from the Probate of the Will, and of the Administrator, from the letters of Administration ; of these, *Profert* is made in the Declaration, but the Plaintiff is not called upon to produce them at the Trial at *Nisi Prius*, unless the Defendant had pleaded "*Ne unques Executor or Administrator*, in which case the production of the Probate, or Letters of Administration under the Seal of the Ordinary, is *primâ facie* sufficient for the Plaintiff, to establish the death of the Testator, and Plaintiff's right to sue.(h)

(g) 2 H. Black. 116.

(h) 2 Esp. N. P. C. 564. 1 Sid. 859. Bull. N. P. 247. 1 Esp. Dig. N. P. 232. plen.

But that is not conclusive on the Defendant: he may show, that the deceased had *bona notabilia* in different Diocesses, and that the Probate produced was not a Prerogative one; that is matter of *vivâ voce* Evidence, showing the different property of the Testator, and where it lay. So he may show, that the Probate is not of sufficient extent; as if, for example, the Suit was for a Bond due to Testator for £1000., and the sum sworn to in the Probate was under 100%, that will appear on the face of the proceedings, and the Plaintiff cannot recover.

So in the case of an Administrator, the Defendant may prove that the Letters of Administration were recalled; that is done by the Evidence from the books of the Spiritual Court where Administration is granted.

The Evidence, in Actions against Executors and Administrators, will be more fully treated of in the next Chapter. It may be sufficient here to observe, that in Actions against them, though they do not plead non-assumpsit, but *plene administravit* only; yet the Plaintiff is bound to prove the extent of his demand, or he will be entitled to a verdict for 1s. only.(i)

10. *Of the Evidence in Actions by and against Husband and Wife—against the Husband alone, and against the Wife alone.*

1. In the case of Actions by Husband and Wife—it should be observed, that the Wife is joined with her Husband as a party on the Record, in those cases only,

(i) Salk. 296.

where the right of Action would survive to her, or where she is the meritorious cause of Action; that is, where the cause of Action accrues in her right, as on a Bond *e. g.* or for any simple contract debt due to her before Marriage.^(k)

In all cases, therefore, in which the Plaintiffs are Husband and Wife, their Marriage should be proved. This is done by a copy of the Register and proof of cohabitation, or the testimony of a witness who was present at the ceremony: mere reputation will not be sufficient.

The Plaintiffs should then prove the demand, and that it was due to the Wife in her own right, and before Marriage; as *e. g.* if she followed any business before Marriage, or a Note or Bill of Exchange was given to her in her maiden name. In the former case the business must be proved, and that the debt arose out of it; in the latter, the writing speaks for itself.

2. If the Wife is indebted before Marriage, the Action must be against both Husband and Wife, and cannot be supported against the Husband alone.^(l) If he, therefore, is sued alone: by proving that the debt for which the Action is brought was contracted before Marriage, the Plaintiff will be non-suited; that fact will appear either from the Plaintiff's witnesses, or by direct proof.

But though in Actions *by* Husband and Wife, the Plaintiff must prove an actual Marriage: in Actions *against them* as Husband and Wife, or against him for a

(k) 1 Esp. Dig. N. P. 153 to 158. and Cas. *ibid.*

(l) 7 Term Rep. 348.

demand on her account ; the Plaintiff is called upon for no such proof,(*m*) it is sufficient for him to prove, that they passed for Man and Wife with his consent, as by suffering her to use his name ; in which case, it is only necessary for the Plaintiff to call witnesses to establish that fact, and then to prove his cause of Action as connected with it, as, *ex. gr.* goods sold to her for wearing apparel.

Of the Evidence for the Defendant in Actions against the Husband and Wife, or against him only, for debts of her contracting.

For debts contracted by the Wife after Marriage, the Husband must be sued alone ; and it will be necessary to show, what Evidence in such cases he may give to meet such demands.

1. The Defendant to an Action for goods furnished to his Wife may show, that they were not Necessaries, or suited to his rank in life.(*n*)

The description of the Articles which the Plaintiff goes for, will show whether they are necessaries or not,(*o*) and that may depend on their quantity, or the charges for them ; as if a Mercer sues a Defendant for silk furnished to his Wife ; the Husband may be liable to a certain extent ; but if they are extravagantly expensive, and furnished to the Wife of a man in moderate circumstances ; it will be incumbent on the Defendant to give in Evidence, what his circumstances are, and show, that with relation to them, the demand is excessive ; this is matter of *viva*

(*m*) Bull. N. P. 136.

(*n*) 1 Esp. Dig. N. P. 153.

(*o*) 1 Lev. 4.

voce Evidence, but such Evidence must be given. Thus, *e. g.* if the Wife of a Clergyman runs him in debt, and he is sued, he may show the amount of his Preferment, and that it is inadequate to such a demand.

2. He may show that the Tradesman, by collusion with the Wife, ran him in debt; that he furnished her with articles concealed from her Husband; that he made her debtor in his books, and not the Husband. (*p*)

These circumstances are matters to be proved by witnesses; and the Plaintiff should have notice to produce his books.

3. The Defendant may prove notice given to the Plaintiff, not to trust his Wife, previous to the furnishing of the Goods for which the Action is brought. (*q*)

It is not uncommon for a Person to give a general notice in the Newspaper to Persons not to trust his Wife; that general notice is insufficient, unless it is brought home to the Plaintiff. The Defendant should prove, by a witness, the giving such notice verbally to the Plaintiff, or by letter; in the latter case, the Plaintiff should have notice to produce the letter, and if not, a copy be proved; if it could be proved, that the Plaintiff had read the paragraph in the Newspaper, that might be sufficient, but not otherwise.

4. The Husband may give in Evidence, that the Wife

(*p*) 5 Taunt. 356.

(*q*) 1 Esp. Dig. 154. 1 Salk. 118.

had eloped from him, and was living away from him when the debt was contracted.(r)

This fact must be clearly proved by witnesses. Such as the leaving of her Husband's house, the place of her residence when she had the goods, and her never being at her Husband's house during the time; as this elopement is often adulterous, if it can be proved, that when so living apart from her Husband, she was cohabiting with another man, that is decisive Evidence for the Defendant.

But in such case, the Defendant should be provided with proof to show, that the elopement was not caused by his ill-treatment of his Wife: as in case it proceeded from that cause, he will be liable for necessaries.(s)

5. The Defendant may show, that his Wife lived apart from him, but that she had a separate allowance for her support. This is a fact to be proved either by a Deed of Separation, or the testimony of witnesses who were acquainted with the Parties; but the Husband must go further, and give in Evidence at the Trial, that the allowance he gave his Wife was proportioned to his circumstances, and was regularly paid.(t)

If the Action is against the Wife alone, she may plead that she is a married woman, and prove her marriage as before described: but the Plaintiff may make her person-

(r) 1 Esp. Dig. 154. Salk. 119. 1 Stra. 647. 1 Stra. 706. 2 Stra. 875.

(s) 2 Stra. 1214. 3 Taunt. 421.

(t) 4 Campb. 70.

ally liable in the Action by proving.—1. That the Husband is an alien enemy, and abjured the realm.—2. That he has been transported for felony, or that he is a foreigner, and not amenable to the laws of this country. These are all capable of *viva voce* proof: but, in the case of Transportation, the Plaintiff ought to have a copy of the Husband's conviction, and proof that he was the Person convicted and transported.

11. *Of the Evidence, in Actions, against Persons standing in the relation of a Parent.*

A Father is bound to provide necessaries for his Children under age, while they remain part of his family, or where he gives them credit. To support this Action, it is necessary to show, that what was furnished was suitable to the Father's circumstances in life; that the child was at that time part of his family; and that what was furnished was reasonable, and not extravagant.

3. *Of the Evidence in Actions against a Person standing in the relation of Master.*

A Master is bound by a contract made by his Servant, as far as he has given him authority, and he acts within it; (u) and where the Master has adopted the act of the Servant, he is bound by similar acts of the Servant afterwards. (x) As if he authorised his Servant to order goods on credit, and he afterwards paid for them; if the Servant afterwards orders others, of which he defrauds his Master, the Master is liable; but if the Master had no dealing

(u) 1 Esp. Dig. N. P. 140. Salk. 442.

(x) 1 Stra. 506.

with a Tradesman directly, but gave money to his Servant to pay for what was furnished, and the Servant embezzles the money, the Master is not liable. Where an Action is so brought, and defended on these grounds, the Plaintiff must prove the delivery of the goods to the Defendant, that the Master had the use of them, and then the Master is called upon to prove that he regularly gave the money to the servant who ordered the goods, to pay for them: and unless the Plaintiff can prove that the Master had paid debts of his antecedent contracting, or a direct order to him by the Master, the Plaintiff will be non-suited.

Such is the Evidence required where the Parties sue, or are sued in a representative and relative character; in addition to which the Plaintiff must prove the Counts in his Declaration on which his right of Action is produced; as, *ex. gr.* If the Action is Assumpsit, by the Assignee of a Bankrupt, for goods sold and delivered by the Bankrupt, in addition to the proof of the regularity of the Commission, by the several necessary steps before-mentioned, the Plaintiff must prove the sale and delivery of the goods, as laid down before in page 66. and the value of them.

4. In the course of the preceding pages, I have incidentally mentioned the Evidence which the Defendant may bring forward as his defence in those particular cases. I shall now proceed to consider the particular Evidence of those matters of defence which most frequently occur, and are applicable to the Pleas in all cases in Assumpsit; and show in what manner such Evidence should be settled in order to furnish a complete defence.

1. *Of the Evidence under Non-Assumpsit.*

Under this Plea, every thing which *directly* disproves the Plaintiff's right of Action, either equitably or legally, may be given in Evidence; but what *collaterally* discharges it must be pleaded.

As if the Plaintiff's claims arise out of, or from an illegal act; as for money charged for treating Voters at an Election, for Stock-jobbing differences, or any contract prohibited by law for an unconscientious demand. The Defendant may give this in Evidence under the Plea of Non-Assumpsit.^(y)

As, *ex. gr.* the Statutes having declared, all securities given for money won at Play, or on a usurious contract, to be void; if the Plaintiff declares on a Bill of Exchange, or Note of Hand; the Defendant, at the Trial, may under the Plea of Non-Assumpsit, give in Evidence the true consideration for which the Bill or Note was given.—Vid. 3 Term Rep. 318. 2 Stra. 1249.

Such also is the case of demands which cannot be legally enforced against the Parties, as in the cases of married women or infants, where the demand is not for necessaries. The one may prove her marriage, and the other his nonage, under the plea of Non-Assumpsit; for they cannot be said to undertake to pay that for which by law they are not liable.

So, in the case of oppressive, unconscientious, or unjust

(y) 1 Esp, Dig. N. P. 109, 110.

bargains the facts may be given in Evidence which establish them ; for the law will not enforce such bargains or contracts.(z)

So in the case of fraudulent transactions.(a)

Lastly, it is clear, that where a Plaintiff has sued for what he gratuitously undertook, the Defendant, on showing that fact, may give Evidence of it under Non-Assumpsit, for under such circumstances he could not be said to undertake to *pay* ; and so in a variety of similar cases.

So the Defendant may show that the Action is brought too soon, as if for goods sold on credit, and the credit is not expired ; for a man does not undertake to pay before the time of payment agreed on.

In all these cases the facts are proved by *viva voce* Evidence.

Thus, the Plea of Infancy is proved, by showing the time of the Defendant's birth. This may be done by calling his Father, or Mother, or the Nurse who was present at his birth, and has known him since. So it may be proved by an entry in the Family Bible ; or the Parish Register of the birth, specifying the time when the Defendant was born ; and by the testimony of Persons who knew his Parents, as described in the Registry ; or the hand-writing of the Father, in his Family Bible, if he is dead : but these latter pieces of Evidence should be carried

(z) Cowp. 793. 4 Term Rep. 166.

(a) Dougl. 433.

further, by proof of Persons acquainted with the family, that the Defendant was the Person mentioned in the Family Bible or Register.

This Evidence is conclusive if the Plaintiff cannot answer it, which he can do in two ways.—1. By showing that the demand is for necessaries suited to the Infant's station and fortune in life; or,—2. That the Defendant made a new promise to pay after he became of full age.

As to giving those matters in Evidence, it must be observed, that though the Defendant may give Infancy in Evidence under the General Issue of Non-Assumpsit: if, he pleads his infancy, the Plaintiff *replies* these matters; but if the Defendant does not plead but gives infancy in Evidence at the Trial; the Plaintiff will then be at liberty to show those matters in Evidence, though not pleaded. If, therefore, it is expected that the Defendant, though he has pleaded the General Issue, means to rely on proof of his infancy, and the Plaintiff has either of the above answers to give to it, he should be prepared with Evidence to that effect at the Trial.

Thus, in an Action against a Defendant for a livery for a Servant, and other articles, for which, as an Infant, he would not be liable, the Plaintiff proved that the Defendant was an Officer in the Army, and that such things were necessary and suitable to his rank. He was held to be liable notwithstanding his infancy.(b)

The Plaintiff should be therefore always prepared with

(b) 8 Term Rep. 578.

proof at the Trial, where it is expected that infancy will be set up; of the Defendant's actual situation in life, in point of fortune and rank.

2. *Coverture* is another defence of the same description; and may also be pleaded, or given in Evidence, under the General Issue. How that is to be proved at the Trial, *vide ante*, page 113.

3. *A Release* may also be pleaded, or given in Evidence under the General Issue, in Assumpsit. And a Release must be by Deed: it is done by proving the execution of it by the subscribing witness; but it must appear to have been made after the cause of Action accrued; otherwise, it is of no avail: that will appear by the date.

This is the effect of a Composition Deed, by which the Defendant assigns his property to Trustees for the benefit of his Creditors, and which Deed contains a Release.

But it is good Evidence, under the General Issue, though there is no Deed, for the Defendant to show, (c) that the Plaintiff agreed to take a Composition, secured by collateral security, in lieu of his Debt: such as, the acceptance of a friend of the Plaintiff's, or the like, and which was given to him; or, that the Plaintiff, by offering to come in under a Composition Deed, induced others to sign it.

4. *Payment* is good Evidence under the General Issue, and cannot be pleaded specially. This may be proved by

parol, or by the Plaintiff's receipt; and the production of a receipt, proved under the Plaintiff's hand, is *prima facie* sufficient, but is not conclusive Evidence. The Plaintiff may show what the circumstances were, and that he did not receive the money at the time the receipt purports. (d)

5. *Usury* may be given in Evidence, under the General Issue in Assumpsit; but is confined to writing instruments, as Bills, Notes, &c. This is proved by showing, that the security was given on a transaction on which there was more than 5 per cent. received.

6. *If the Action is for Goods sold*, the Defendant may give in Evidence under the General Issue, that they were sold on credit, which is not expired; and this time of credit is either by agreement on the actual sale, or the usage of Trade; (e) that they were contraband, or unsaleable; that they were sold by sample, from which they vary; or any ground which shows it to be unjust to charge him; or that fraud was practised on him.

But matters of Law, which go in discharge of the Action, must be pleaded, and proved as they are pleaded.

Such as—

1. *The Statute of Limitations.* In this case, if the debt arises under a written Instrument, in which the time of payment is specified, the limitation is ascertained by the lapse

(d) 2 Term Rep. 366.

(e) 1 Esp. Dig. N. P. 112. Cowp. 341. 5 Taunt. 181.

of time intervening between the time of payment and the bringing of the Action.

In every case of this sort, as the time of the debt becoming due, appears by the Instrument, the time of the commencement of the Suit will appear by the Memorandum on the Record, or by the production of the Writ, or of the Copy of it served on the Defendant, which he should have ready to produce, to show the true time when it was sued out.

If the debt arises from a loan of money, or is a demand arising from any thing collateral, where there is no writing to ascertain it, as on a claim for Rent ; for breach of an Agreement, or the like ; the Defendant should give Evidence of the time when the debt was due, and the demand accrued, and then of the commencement of the Suit, as before-mentioned. This Evidence is, therefore, composed of written, and parol Evidence ; written, by producing the Writ, or referring to the Record, and parol by proof of the time when the debt accrued.

What is stated here is matter of Evidence, where the Plaintiff joins Issue on the Plea of the Statute only : but as the Plaintiff may reply a new promise, or process, sued out to save the Statute ; in the former case, he must call a witness to prove the promise made at a certain time, or Defendant's hand-writing to a letter, or the like. In the latter, he must produce the Writ, when the time of suing it out will appear, which he must show returned, and the continuance, if any. (*f*)

(*f*) Vid. Cases, 1 Esp. Dig. N. P. 187. 3 Term Rep. 662. 1 Wils. 167.

2. *Bankruptcy* is a good plea in Assumpsit. (g)

The Evidence, in support of this Plea, which is given by the Statute, is the production of the Bankrupt's Certificate ; it is not usual to call for Evidence of the Signatures to it. (h) The Plea of Bankruptcy goes to the Country, and the production of the Certificate is *primâ facie*, but not conclusive Evidence for the Defendant : for concluding to the Country, and the Plaintiff not being admitted, for that reason, to reply the special matter, he is forced to join Issue ; (i) he may, therefore, give in Evidence a new promise, made by the Bankrupt after his Bankruptcy ; or, that the Certificate is void, by reason of the Bankrupt's having lost money at Play, &c. ; and, on giving that Evidence, if satisfactory to a Jury, the Plaintiff will have a verdict. These are matters of fact, and proveable by witnesses who heard the Bankrupt's promise to pay, or saw him lose the money at Gaming ; but the Defendant may show, that the promise was conditional only.

A Tender must be pleaded. (k)

In this case, the Defendant must prove the offer of the sum tendered, in money, by showing the actual production of the sum, either in specie, or in a bag, or purse ; by a witness who tendered it to the Defendant, or saw it tendered : (l) and he must be able to prove the same sum was tendered which is mentioned in the Plea, or a great-

(g) 1 Esp. Dig. N. P. 190.

(h) Ludford v. Barber, 1 Term Rep. 86.

(i) Cowp. 544. 2 H. Black. 116.

(k) 1 Esp. Dig. N. P. 194. 5 Co. 114. 6 Esp. N. P. C. 46.

(l) Per Leblanc J. 3 Campb. 70.

er, if in moneys numbered, or in Bank-notes, to which the Defendant made no objection ; but, if the Tender is in Bank-notes, if they exceed the sum pleaded to be tendered, that Tender is bad. So, if the Issue is on a subsequent demand, or refusal, the Plaintiff must prove a demand of the exact sum tendered. (*m*) But the sum tendered must always be produced in money, or Bank-notes, so that Plaintiff, if he pleases, may count it, and take it, if he wishes to do so ; unless he refuses to take it ; as, if he says, “ You need not produce it, I shall not accept it.” (*n*) But, in that case, the Defendant must be able to prove, that the person had the money, ready to pay, if the Plaintiff would have accepted it, though he did not produce it ; and a Tender to an Agent authorized to receive the money, is good : but, if the Defendant relies upon a Tender which he has made to an Agent, he must prove, that such Agent was authorized to receive it ; as to the Attorney, who demanded the money (for example) of him on the part of the Plaintiff. (*o*)

5. *A Set off* is a good plea in Assumpsit, or in Debt ; but it may also be given in Evidence where the General Issue is pleaded, and notice has been given of it.

A Set off arises in cases of mutual demand ; and as it is a claim on the part of the Defendant from the Plaintiff of a debt due to him, the same Evidence is required on the part of the Defendant to establish that debt, as would be, if he were Plaintiff. As, *e. g.* if the Defendant sets off

(*m*) 1 Camp. 182. 1 Esp. N. P. C. 68.

(*n*) Peake, N. P. C. 88.

(*o*) 1 Campb. 477. 2 Mau. & Selw. 86.

a debt, due by the Plaintiff to him, for goods sold and delivered, he must prove the sale, delivery, and value of the goods, by the mode of proof before-mentioned for the Plaintiff: if he claims a Promissory Note of the Plaintiff's, as a set off, he must prove the Plaintiff's hand-writing; and if it was a Note indorsed to him, he must prove the Indorser's hand-writing; and so in other instances.

It does not belong to this Treatise to state, what debts can, or cannot, be set off; that belongs to elementary books: (*p*) it is sufficient to observe, that what can be set off must be an existing, and liquidated *debt*, and not damages; and such as can be recovered, as a debt at law. But every description of debt, of whatever nature; as, by simple contract, Bond, Judgment, or Record, are all objects of set off, and must all be proved in the same way as if the Plaintiff had declared on them. As a Bond may be set off, and the subscribing witness must be called, to prove the execution of it. (*q*) A judgment may be set off; and it must be proved by a witness producing a copy examined with the Record. (*r*)

6. Foreign attachment is also a good Plea. *Vide post*, *ch. of Debt*.

(*p*) *Vid.* Cases in 1 Esp. D. N. P. 263 to 268 *passim*. Cowp. 57. 6 Term Rep. 488.

(*q*) 2 Bur. 1229. 2 Black. Rep. 826.

(*r*) *Vid.* 2 Burr. 1024. 4 Esp. N. P. C. 207. 2 Term Rep. 32. Bull. N. P. 180. 16 East. 36. 1 Term Rep. 112. 5 Term Rep. 493.

CHAPTER III.

OF SETTTLING THE EVIDENCE IN THE ACTION OF DEBT.

THE Action of Debt is maintainable either on simple, or on special contract, or matter of Record. I shall, therefore, first consider the Evidence, as it applies to the contract, or security ; secondly, as it applies to the Person.

1.—*Of settling the Evidence in Debt, as it applies to the contract.*

Debt, on simple contract, in respect to the Evidence, differs nothing from the Action of Assumpsit ; and the Rule for settling the Evidence, under the head of money lent, goods sold and delivered, and the other Counts founded upon contract, in that Action, is, in every respect, the same, and, where the Action is Debt, may be referred to.

Debt, on special contract, is—1. For money due on Bonds.—2. For Rent reserved by Deed.—3. On matters of Record. These constitute the principal heads, and will be treated of in their order.

1. *Of the Evidence in Debt on Bond.*1. *Of Bonds for payment of Money.*

The Declaration in debt on Bond states, that the Defendant by his writing obligatory bearing date, &c., became bound to the Plaintiff in l.—to be paid to the Plaintiff or his Assigns. The breach is, that he had not paid;—the Declaration concludes with Profert of the Bond.

The General Issue is *non est factum*.

In this case, the Plaintiff is bound at the Trial to *produce the Bond itself*, when he has declared with a Profert; and no secondary Evidence will be admitted, such as a copy, though the original is proved to be lost; and though in one case it was proved that the Defendant had taken away the original, and said he had burned it, secondary Evidence was refused.(a) In cases, therefore, where the original is lost, the Plaintiff should not declare with a Profert: but state the Bond to be lost by time or accident, or to be in Defendant's possession.

The Bond being produced, it must be proved by calling the subscribing witness to prove the execution of it by the Defendant, and the delivery of it as his Bond.(b)

The Rule must be taken as general, that the subscribing witness must be called in this, as in all other cases, that

(a) *Smith v. Woodward*, 4 East. 585.

(b) *Bull. N. P.* 254.

is, if his attendance can by any possibility be procured; but as this, it sometimes happens, cannot be done, the Courts admit inferior Evidence, that is, proof of the handwriting of the subscribing witness, and of the obligor of the Bond. In settling, therefore, the Evidence, those cases are to be attended to, as exceptions to the general Rule. But in *all cases*, the Plaintiff, where he does not call the subscribing witness, must account for why he does not do so, by calling a witness to prove his having used exertions to get him subpoenaed, and showing the circumstances respecting the witness, as the reason why he is not brought forward.

The Courts have, however, admitted Evidence of handwriting of the witness, and of the obligor, as proof of the execution of the Bond, in the following instances :—(c)

1. Where the witness has proved to have *gone abroad*, and to be so at the time of the Trial, so as not to be amenable to the process of the Court; as if an Officer or Sailor is absent on service, *ex. gr.* or there is any other cause to account for his absence: but full proof of both facts is required.(d)

2. Where it was proved that the witness had *absconded*, and could not be found, as where he had absconded to avoid his Creditors;(e) or had not surrendered to his Commission, though declared a Bankrupt: but in all cases, Evidence must be given of diligence and inquiry at the places where the witness had been known to reside or

(c) 1 Esp. Dig. N. P. 282.

(d) Dougl. 89, 7 Term Rep. 266. 1 Campb. 171. 1 Taunt. 364.

(e) 2 East. 183. 1 Campb. 304. 1 Taunt. 364.

frequent, and inquiries made of Persons to whom he was known.(f)

In fact, the Rule as requiring the calling of the subscribing witness in all cases must be noticed : and where, from any circumstances, it is proved that, after very diligent search and inquiry, the witness cannot be found, secondary Evidence, that is, of his hand-writing, is admitted.

In this respect, these points are to be observed in proving the execution of Bonds and of other Deeds.

1. If there is no subscribing witness, it is sufficient for the Plaintiff to prove the hand-writing of the Defendant, or his admission.(g)

2. If the subscribing witness is proved to be dead, proof of his hand-writing is sufficient ; and if there are two subscribing witnesses, one dead, and the other beyond the sea, proving the hand-writing of him that is dead is sufficient.(h)

3. Where from change of circumstances he has become a Party on the Record : as if the Obligee had made the subscribing witnesses his Executor : this fact being established, Evidence of his hand-writing will be sufficient.(i)

4. Where the witness has become infamous from a

(f) 2 Campb. 282.

(g) 1 Esp. Dig. N. P. 282.

(h) 2 Atk. 48.

(i) 1 Stra. 320

conviction, and so inadmissible, proof of his hand-writing will be sufficient.^(k)

5. If a fictitious name is put to a Bond as a subscribing witness, on proof that it is so, it will be sufficient to prove Defendant's hand-writing.^(l)

And this Rule, requiring the subscribing witness in all cases to be called where he can be procured,^(m) is carried so far, that the obligee is not suffered to admit his own hand-writing; and even when on an examination on oath he admitted it in a Deposition before Commissioners of Bankrupts, such Deposition was not allowed as Evidence of his execution of it.

2. *Of the Evidence in Debt on Bail Bonds.*

This Action may be against the original Defendant, or against the Bail. If the Action of Debt is on a Bail Bond against the Bail, it is either by the Sheriff to whom it is given, or by the Assignee of the Sheriff, under the Statute of Anne. The Declaration, if by the Assignee, sets out the issuing of the Writ in the original Action; the delivery to the Sheriff; the arrest of the Defendant; that the Defendant in the present Action became Bail to the Sheriff, conditioned for the Defendant's appearance at the return of the Writ; that the Defendant did not appear according to the condition of the Bail Bond; and, lastly, the assignment of the Bond by the Sheriff to the Plaintiff: if the Plea is *non est factum*, the Plaintiff need only prove the execution of the Bail Bond itself by the subscribing

(k) 2 Stra. 833.

(m) Doug. 2054 East. 53.

(l) Peake's N. P. C. 23.

witness as laid down before ; for though the Declaration contains many averments, and the title to sue, is derived from the assignment by the Sheriff in pursuance of the Statute, as that is by Indorsement only, and not by Deed, the only *Deed* mentioned in the Declaration is the Bond, the Plea applies to it, and it is the only Issue on the Record ; so that the execution of it being proved by the subscribing witness, the Plaintiff is entitled to a verdict.

It is, however, not unusual, as a trick in this Action, to plead *nil debet* ; which is a bad Plea in law, and should be demurred to : but if suffered to stand, and Issue is joined on it, in that case the Plaintiff is bound to prove every averment in the Declaration, viz. “ The issuing of the Writ, the arrest of the Defendant, the execution of the Bond, and the assignment by the Sheriff.”

3. *Of the Evidence in Debt on Bonds of Indemnity.*

If the Bond sued on is an *Indemnity Bond*, or for *performance of Covenants*, so that no specific sum of money appears to be due on the face of it, but is to be decided by the damages to be found by a Jury on the breaches to be assigned, and *non est factum* is pleaded, the Plaintiff in that case must assign breaches under Stat. 4. and 5. Wm. III. That was formerly done in the Replication ; but the usual course now is, for the Plaintiff to set out the condition of the Bond, and assign the breaches in his Declaration. But if the Plaintiff declares generally on the Bond, and the Defendant craves oyer of the condition, and pleads performance, the Plaintiff in his Replication sets out the breaches on which Issue is joined.

In these cases, if *non est factum* is pleaded, the Plaintiff

must prove the execution of the Bond, and then give Evidence of the breaches.

As if the Bond was to indemnify a Party who had taken a Clerk, and the condition was for his faithful service, and accounting for all moneys of the Plaintiff's which he should receive, and the Plaintiff assigned a breach, that the Clerk received from A. B. a certain sum of money belonging to him, which he had not accounted for. He must call A. B., or some other witness, to prove, that A. B. paid him such a sum of money on the Plaintiff's account; and it will lie on the Defendant to prove, that he did account for it.

4. *If the Bond is for performance of Covenants in a Lease, or Indenture, the Plaintiff must produce, and prove the execution of the Lease, or Indenture of Demise, as well as the Bond; by the subscribing witness; and then give Evidence as to the Covenant broken, by calling a witness, to prove the fact. He must then prove the sum at which he ascertains his damages.*

5. *Of the Evidence in Debt on Annuity Bonds.*

If the Action is on an Annuity Bond or Deed to recover arrears of the Annuity, the Plaintiff must prove the execution of the Deed, and also that the Grantor, or Person for whose life the Annuity was granted, is living.

6. *If the Action is on a Bond for the performance of an Award, the Plaintiff must prove the execution of the Bond, and then the Award must be produced, and the execution of it by the Arbitrator be also proved: if there is a subscribing witness to it, he should be called to prove it: if*

there is any thing in the Award by which the Plaintiff is required to do any thing previous to his suing for the money awarded, he must prove by a witness that he has done it ; and he should, lastly, prove a demand of the money from the Defendant, or that he attended at the place where the Arbitrator had directed it to be paid, and that no one attended to pay it.(n)

7. Bonds are suable *against the Heir, or Executor of the Obligor*. Where such an Action is brought, in addition to proving the Bond, in which it must appear from the words, that the Obligor bound his Heirs, Executors, or Administrators, the Plaintiff must prove the Defendant to be Heir to the Obligor, by calling a witness who knew the Obligor, and his family, and that the Defendant is his Heir at Law. If the Defendant is sued, as Executor, or Administrator, the book from the Commons, in which are the entries of Probates, and Administration, should be produced by an Officer of the Court.

II. *Of the Evidence in Debt for Rent.*

This Evidence is different where it is reserved on a lease, or on a parol demise, though in both the Declaration is general.

If the Action is Debt for Rent reserved by Lease, and non est factum is pleaded : the Plaintiff has only to prove the execution of the Lease by the subscribing witness, and state how much Rent is in arrear ; if he goes for more

(n) 2 Marsh, Rep. 304.

than is due, the Defendant may prove the Rent really due, by showing when he last paid ; and though the Defendant may prove the Rent really due, by showing when he last paid ; and though the Defendant holds under a Lease, or Indenture, of Demise, the Plaintiff is not required to prove any entry, or occupation, by the Defendant ; but if the Action was Debt for Rent on a parol demise, or not under Seal, Plaintiff must prove actual entry and occupation. (o)

If the Defendant plead *riens en arriere*, alone, the Issue lies upon him, and he must prove payment.

If the Action is Debt under the Stat. 4. Geo. II. c. 28, for double the value of the Premises, which the Defendant held, as Tenant to the Plaintiff, and held over after notice : the Plaintiff must prove the antecedent Tenancy of the Defendant to him, as Landlord, and when his Tenancy regularly ended ; that he had notice to quit, which corresponded with his holding, that is, if his Tenancy expired at Michaelmas, the notice must do so too : this must be proved, by the Person who served the notice to quit on the Defendant, the Tenant ; and the Defendant should have notice to produce the original. The Plaintiff should also *regularly prove a demand* by him of the possession *on expiration of the notice* to quit, (The notice to quit has been held to be a sufficient demand in *Williamson v. Colley*, 5 Burr. 2694. But, *query*, as the word *demand* is used in the Stat.) and that the Defendant did not deliver up the possession ; and, lastly, the value of the Premises let. The Rent reserved, is usually taken as the value :

(o) *Bellasis v. Burbach*, 1 Salk. 209.

but the Plaintiff is not bound by it, but may bring witnesses to prove the actual value, which, in the cases of old Leases, usually much exceeds the Rent.

If the Action is under the Stat. 11 Geo. II. c. 19. to recover double Rent after a notice to quit, by the Tenant, the same Evidence of Tenancy must be given, as above stated. The Plaintiff must then produce, and prove, the notice of quitting, by proving the service of the notice on him, and prove Defendant's hand-writing, if his name is subscribed to it; or, that it was given, and served, by his authority. He must then prove, that the Tenant did not quit at the time specified in the notice; and, lastly, the yearly Rent, under which he held.

*If the Action is Debt, for three years' Rent of the Premises, by reason of the Tenant's not having given notice of an Ejectment served on him, by which there has been a recovery in Ejectment: the Plaintiff must prove, that the Defendant was his Tenant; and that an Ejectment was served on him. This Evidence must be had from the Lessor of the Plaintiff, or rather, from his Attorney, by a *subpœna duces tecum* of the Declaration and proceedings in Ejectment, and, by calling the Person who served the Declaration in Ejectment on the Tenant, (the Defendant;) this witness may be found out by examining the Affidavits filed with the Clerk of the Rules for Judgment against the casual Ejector, if not otherwise to be found out; and lastly, the Judgment in Ejectment, and the Writ of Possession executed, the former by an examined copy of it, the latter by proving a Warrant made out on the Writ of Possession to the Sheriff's Officer, who must also have a *sub-**

pœna duces tecum of the Warrant, and prove that he had executed it.

If an Assignee of the Reversion brings debt for Rent, he must prove all the assignments from the original Lessor, (*p*) and call the subscribing witnesses, if by Deed; if any are by Will, he must prove the Will, or if the Lessor was himself only Tenant for years, Probate of his Will will do.

In Debt for Rent, not under Seal, the Evidence is the same as in Assumpsit for Use and Occupation.

III. Of the Evidence in Debt on matters of Record.

In Debt on Recognisances of Bail against the Principal, the Evidence, in this case, depends on the Plea. (*q*) The Recognisance itself is matter of Record; and if Defendant pleads *nul tiel* Record, it is tried by the Court; so is the Judgment recited in the Declaration. But he may plead to the Country, as payment, or render of the Principal in due time. The first is a matter of fact to be proved, as before stated, in the case of payment: if he pleads a render, he must give in Evidence the Book of the Marshal of K. B. or the Warden of the Fleet, to be produced by the Officer, or an examined copy of the render as entered there, by which the true time of it will appear.

If the Debt is against one of the Bail on the Recognisance, he may plead the same Pleas, and give the same Evidence as just now stated in the case of the Principal:

(*p*) Vid. Esp. N. P. Dig. 243. (*q*) Chitty, Plead. 2d Ed. 220.

but he may also plead, and prove, the death of the Principal before the return of the *ca. sa.* issued in the Cause, or that no *ca. sa.* issued. (*p*)

If the Action is Debt on Judgment.

The Judgment, when recovered, being matter of Record, when Plaintiff declares on it, and Defendant pleads to the country, as payment, *e. g.* an office, or attested copy of the Judgment, produced by a witness, who examined it with the original, and proof that it is a correct copy, is sufficient Evidence for the Plaintiff. Evidence of the payment lies on Defendant.

But Debt also lies on *foreign Judgments*: but they are not considered as matters of Record, so that the mere production of a copy of the Judgment is sufficient: they are required to be further authenticated. They are, as expressed by *Ld. C. J. Eyre*, 2 H. Black. 410. *primâ facie* Evidence of a Debt, and have the force of a simple contract. They are, therefore, so declared on, and then are thus proved: (*q*) Judgments from the Courts in the West India Islands, or Colonies abroad, are given in Evidence here, by producing a copy of the Judgment under the Seal of the Court; a copy, though authenticated by an Officer of the Court, will not be sufficient, even though it were signed by the Judge of it. (*r*) It is then necessary to prove that the Seal affixed to the Copy, is the Seal of the Island,

(*p*) 1 Esp. Dig. N. P. 226. Cro. El. 733. 2 Stra. 915. 4 Burr. 2134.

(*q*) *Walker v. Witter.* Dougl. 1.

(*r*) 2 Starkie, 6.

or Colony, without which, it is inadmissible ; and proof of the Judge's hand is not sufficient.(s)

Judgments from Ireland, and Scotland, are proved by an examined Copy of the Judgments there, produced by the Person who examined them, and who must swear to their being correct.

I shall now consider the Evidence in Actions of Debt, which respect the *Person*, and the Rules as to establishing the character in which the Plaintiff sues, or the Defendant is sued, as where the Action is by, or against, Husband and Wife, or by, and against, Executor or Administrator, are the same as before laid down.

I shall, therefore, only observe on the most useful and important.

1. *Of the Evidence in Debt against the Sheriff.*

Debt lies against the Sheriff, for an *escape* of a Defendant in execution ; and the whole sum will be recovered with which he was charged in execution.(t)

The Evidence which must be brought on the part of the Plaintiff is,—1. The attested Copy of the Judgment recovered in the original Action against the Person who escaped.—2. The Plaintiff next is to prove, a Writ of *capias ad satisfaciendum* obtained on that Judgment, directed to the Sheriff, and the delivery of it to the Sheriff, and a Warrant made out on it, directed to some officer of the

(s) 4 Esp. N. P. C. 228.

(t) Esp. Dig. N. P. 235.

Sheriff who arrested the Defendant : his actual caption by the Officer must be proved ; and after such caption, that the Defendant was seen at large.

The Copy of the Judgment is had at the Treasury, and must be proved by the witness who examined it. The Writ, which must be proved to have been delivered to the Sheriff, is returned, and filed, at the same place ; in which case, the Defendant must have an attested Copy of the Writ, and Return, proved by a witness in the same way ; and it will also show for what sum the Writ was marked, and that proves these averments : and if there is also his return of *cepi corpus*, it also establishes the fact of the actual arrest ; and then the whole of the remaining Evidence is, that after that return the Defendant was seen at large.

2. If the Action is against the Sheriff *on Stat. 29 Eliz. c. 4.* That Action is usually at the suit of the Defendant, under the Execution against whose goods an over levy has been made. The Plaintiff must prove the suing out of a Writ of *fi. fa.* directed to the Sheriff, and delivered to him. The sale by the Sheriff must be proved by the same Evidence as before, and the amount of the levy, and what has been paid over to him : if the Sheriff has charged, (exclusive of what is allowed by Stat. 43 Geo. III.) more than the poundage allowed by the Stat. 29 Eliz. which is ascertained by deducting all the regular charges from the sum levied ; on Evidence of that so made out, the Plaintiff is entitled to recover.(u)

So if the Defendant is taken under a *ca. sa.* and the

(u) 1 Esp. Dig. N. P. 236. 2 Term Rep. 238.

Sheriff makes the Plaintiff pay more to him than he is entitled to as before stated, as allowed by the Statute and proves that fact, he will be entitled to recover the penalty.

This Action will also lie against the Marshal of K. B., the Warden of the Fleet, or any Gaoler having the custody of Persons for Debt.

In these Actions, the Plaintiff must prove the Judgment against the Defendant who escaped, as in the last Precedent; and then prove the *committitur* to the custody of the Marshal, Warden of the Fleet, or other Gaoler, in this way. He should procure a copy of the *committitur* from the books of the Prison, by which, it will appear, that the Party was in custody, and for what sum. He should give notice to produce the original book at the Trial; and he should then prove by a witness who knew the Person of the original Defendant, that he was seen at large after his having been so in custody.

Debt is also the mode of declaring for *penalties under Penal Statutes*, and lies at the Suit of an Informer.

It would be extending the subject of this Treatise too far, to go into all the cases of Debt on Penal Statutes; it is sufficient to observe, that the strictest Evidence is required to bring the Defendant within them: and, in settling the Evidence, it ought never to be done without having the Statute open, and seeing that there is Evidence to satisfy every thing which the Statute requires. Thus, for example in Debt, for killing Game without a qualification, under Stat. 5 Anne, c. 14.

The Evidence, required in this case, is the fact of the

Defendant using a gun or snares to destroy the Game ; which is done by a witness who saw the fact : but it is not sufficient to obtain a Verdict, that the Defendant, being unqualified, was seen with a gun : he must be proved to have been using it. That is, the Evidence must show that he was seen beating for Game, or firing at them, which would leave no doubt that he was using it for the destruction of the Game. But the Evidence required, where the Action is for exposing Game for Sale, is not so strict. Proof of the actual Sale of it is not required, as the fact of its being seen in the unqualified Person's possession is sufficient, which, if proved by a witness, is sufficient ; but the reason of this is, that it is declared to be so by the Statute. In other cases of Penal Actions the strictest proof is required.

Such is the Evidence on the part of the *Plaintiff* ; that which is to be brought on the part of the *Defendant* depends, of course, on the Issue, and I shall consider it under the different Pleas.

The usual Pleas in Debt on Specialty, for payment of money, are, *non est factum*, *solvit ad*, or *post, diem*.

1. Under *non est factum*, pleaded to Debt on Bond, the Defendant may give in Evidence, what shows it to be void on the face of it, as well as what denies the execution, or that he ever delivered it as his Deed.

Such as *rasure*, *interlineation*, or *breaking off of the Seal* ; any of which appearing, render the Bond void.(v)

.(v) Esp. Dig- 251. Cro. El. 626.

These facts will appear on the production of the Deed, the Plaintiff being bound to produce and prove the execution of it, when *non est factum* is pleaded.

So the Defendant at the Trial may, under that Issue, give in Evidence that he never *delivered it as his Deed*; or that it was made to the Plaintiff's Wife, and that he refused to receive it; or that it was delivered as an escrow; that there has been an erasure in a material part, or an alteration.(x)

So in the case of a Bail Bond—as it is founded on a Writ, and is given for the appearance of a Defendant at the return of the Writ:(y) the Bond being proved—the Defendant by either producing the Writ, or relying on it as stated in the Declaration, and then referring to the date of the Bail Bond; if it appears to be subsequent to the return of the Writ, it shows it to be void; for, being after the return of the Writ, the condition could never be performed, it being for the Defendants' appearance *at the return*.

Wherever, therefore, it appears on the face of the Bond that it is void, it may be given in Evidence under *non est factum*. But extrinsic matters which avoid the Bond in law, must be pleaded and proved, as Usury; that the Bond was given for an illegal purpose, as Simony; for money won at Play; for the sale of an Office; in restraint of Marriage, or of Trade, and the like: these must be made out at the Trial by Evidence.

2. If the Plea is *solvit ad diem* or *post diem*.

(x) 4 Esp. N. P. C. 255.

(y) 4 Mau. & Selw. 338.

This Issue is supported by Evidence on the part of Defendant of actual payment, as by the production of a Receipt in the Plaintiff's hand-writing ; or the Defendant may rely on the presumption of law, that from that length of time, payment will be presumed, in which case no Evidence on his part is required ; for the date of the Bond ascertains the debt ; and if twenty years have elapsed, and no interest been paid, it is conclusive Evidence for him under the Issue of *solvit ad diem* ; and the expiration of the 20 years is ascertained by showing the time of bringing the Action.

It should, however, be observed, that the period intervening between the date of the Bond, and the bringing the Action, must be full 20 years ; for any time short of it will not be sufficient.(z)

3. *Foreign Attachment* is a good Plea.

This is usually proved by an Officer, or Solicitor, of the City Court, who produces the original Proceedings in the Cause, and verifies them to be so.

But further Evidence should be given, that the Plaintiff had notice of the Proceedings in the Courts below.

4. *Entry and Eviction* is a good Plea in Debt for Rent ;(a) but it may be given in Evidence under the General Issue of *nil debet*. Vid. *post*. 161.

This is a fact to be proved by Witnesses.(b) And the

(z) 1 Esp. Dig. N. P. 253. 1 Term Rep. 270. 1 Campb. 27.

(a) 1 Esp. Dig. N. P. 260.

(b) *Hunt v. Cope*, Cowp. 242.

Defendant must give in Evidence the actual entry by the Plaintiff on the Premises; and not only that, as that might only amount to a trespass, (c) but he must further prove, that he was expelled by the Plaintiff from the possession of the whole, or a part, of the thing demised, and that he kept the possession against him.(d)

Vid. *post.* in Covenant, next Chapter.

4. A discharge under the Insolvent Debtors' Act is a good Plea in Debt or Assumpsit: it is either under the Lords' Act, or under the general Insolvent act.

If under the former, the Defendant must produce the Rule of Court by which he was discharged; if the latter, the order of the Insolvent Court.

5. If the Pleas are by an *Executor or Administrator*.

They are, first, a *Retainer*, though the Defendant may also give it in Evidence, under *plene administravit*; (e)
2. *Plene Administravit*; and, 3. *Ne unques Exectuor*.

1. *If Defendant pleads a Retainer*, he is bound to establish his own Debt by the same Evidence which would be required to establish the demand as a Debt against the Testator; as if it was a Bond Debt, by proving it by the Subscribing Witness; if by a Note, by proof of it as before stated in Assumpsit; and having done so, the law gives him his right of Retainer to their amount.

(c) Reynolds v. Buckle, Hob. 326. (d) Vid. 2 East. 575.

(e) 3 Burr. 1580. 1 Esp. Dig. N. P. 273.

2. If Defendant pleads *plene administravit*.

That Issue is supported, by proving the Payment of Debts due by the Testator to others, which were of a higher or equal degree with that for which the Action is brought, and which were so paid before the Action brought. (f)

Evidence of these Payments are matters of fact, and to be proved by Witnesses: this most usually is done by the Parties themselves, to whom the Payments have been made, and who can establish the existence of the Debts due to them, as well as the Payments. So if there were any written Securities of the Testator, as Bonds or Notes, paid off by the Executor, they should be produced and proved to be paid; but they must be shown to be valid Securities, and entitled to preference. (h) If, therefore, the Executor sets up a Bond as paid, he must prove the sealing and delivery of it; but the proof of mere Payment of simple contract Debts is sufficient. (i)

If the Defendant pleads *plene administravit*, on which Issue is joined, in order to charge him with Assets, the Plaintiff must show what effects he had: such as the value of Testator's Stock, Debts, &c.: and for that purpose he may give in Evidence the Inventory he exhibited to the Spiritual Court, and signed by him; and if so it shall charge him to the extent: and the Plaintiff may also surcharge it, by showing the Property undervalued or Property omitted; and if in the account the Defendant

(f) 1 Esp. Dig. N. P. 275.

(h) 1 Esp. Dig. 286.

(i) *Saunderson v. Mitchell*, 1 Show. 81.

gave in a list of Debts, not distinguishing the good Debts from the bad, he shall be charged with all.(k.)

3. If the Defendant pleads *Ne unques Executor*.

This Plea is a denial of the Plaintiff's right to sue in the character of Executor. It is not a mere denial he has not got Probate of the will, for that he makes Profert of, but it is that he is not rightful Executor.

As, for example,—if Probate had been granted to the Plaintiff of a Will, which was afterwards set aside for Forgery, or Fraud: though the Plaintiff once was in possession of a Probate, and so could have made a Profert, the Letters testamentary being annulled, he is no longer Executor, *ne unques Executor*. In a case, therefore, so circumstanced, the Defendant should give in Evidence the sentence of the Spiritual Court, by which the Will was set aside, and a new Probate ordered to be granted, by which it will appear, that the Plaintiff was not then Executor.

Under this Issue the Defendant may show, that the Probate has been irregularly granted, in respect of *bona notabilia*.

Thus, if the Plaintiff, had declared as Executor, and made profert of a Probate, granted by the Bishop of London, and the Defendant proved, that the Testator had *bona notabilia* in the Diocese of another Bishop,(l) the Probate would be *void*, for there should then have been a *Pre-*

(k) 1 Esp. Dig. 286.

1 Dig. N. P. Esp. 279.

rogative Probate,^(m) or Letters of Administration ; the Defendant, therefore, in support of his Plea should give Evidence of the Deceased having left Assets in different Dioceses ; and then he supports his Plea : and as to this it may be observed, that Bonds, or Specialties, are Assets, where the Securities are when the Testator died ; but Debts by Simple Contract follow the Person, and are Assets where he died.⁽ⁿ⁾

So if the Action is brought for a greater sum than is sworn to, on granting the Probate (or Letters of Administration)^(o) the Executor cannot recover ; for then the Probate, or Letters of Administration, are void, for want of a proper stamp.^(p)

To establish this defence, the Defendant must produce a copy of the Bond given on granting the Probate, or Administration, and filed in the Prerogative Court, or Office, of the Bishop, or have the original produced by the Officer. As the Probate, or Letter of Administration, must be produced under the Plea of *ne unques Executor*, it will then appear, whether the Probate, or Letter of Administration have been granted for a sufficient sum.

And it should seem, that the Defendant might go into Evidence, to show how much Property the Plaintiff had of the Testators, and then by the production of the Bond, and what appears on the face of the Probate *viz.* “ sworn to be under £——” the Plaintiff could not succeed on this

(m) 1 Str. 74.

(n) Cro. El. 472.

(o) 3 Taunt. 113.

(p) 2 Mau. & Selw. 553.

Plea : so Defendant may show the Seal of the Ordinary forged.

6. *Of the Evidence in Actions against Assignees of a Lease or Term, for Rent in Arrear.*

If the Lessee assigns, *(q)* he remains still liable in Debt for Rent, becoming due after Assignment, *(r)* unless the Lessor has accepted Rent from the Assignee, in which case, he can never sue in Debt the first Lessee. *(s)*

If, therefore, there has been an Assignment, and the Lessor has accepted Rent of the Assignee, and he sues the original Lessee ; the Lessee, if he sued, will be discharged, by producing, and regularly proving, the Deed of Assignment to some Person : then proving the receipt of Rent by the Plaintiff from such Person as Assignee ; and for that purpose, the Assignee is a good Witness.

But if the Action is against an Assignee, *(t)* for Rent in arrear, he is only liable while in possession ; and he may show an Assignment made by him prior to the cause of Action accruing, to a third Person, by producing, and proving such Assignment, and that he was not in possession during the time for which the rent is sued for : for this purpose his Assignee is a good witness to prove, when *he* became so.

An Executor is considered as an Assignee in Law ; and the same Rule applies to him. *(u)*

(q) Esp. Dig. N. P. 233.

(r) Walker's case, 3 Co. 22.

(s) Marsh v. Bruce, Cro. Jac. 334. *(t)* 2 Stra. 1221. Salk. 81.

(u) Cro. Eliz. 715.

7. *Of the Evidence on the Plea of Accord, and Satisfaction.*

As the Plea must set out what the Defendant gave in satisfaction of the Plaintiff's demand, he must prove, *first*, that the Plaintiff agreed to take the thing mentioned, in satisfaction of his demand; and, *secondly*, that it was absolutely delivered, so that the whole transaction is complete and ended. That is to be done by witnesses who were present when the Plaintiff agreed to take the thing stated in discharge of his demand, and then the Defendant must prove the delivery of it to the Plaintiff.

8. *Of the Evidence under the Plea of Nil Debet.*

In Actions of Debt on Simple Contract, *Nil Debet* is the General Issue; and it is material to consider, what the Defendant may give in Evidence under it. (x)

1. He may produce the Writ, and show *when* the cause of Action accrued; whereon the *Statute of Limitations* may attach, and be a bar to the Action: for the Statute need not be pleaded. (y)

2. He may give Entry and Expulsion in Evidence under that Issue: though he may also plead it: for the Plaintiff would fail in that case to prove, that the Defendant "entered and was thereof possessed;" *ante*, 65. (z)

3. That he was only Executor *durante minore ætate*; (a)

(x) Esp. Dig. Vol. I. 287.

(y) Anon. Salk. 278.

(z) 1 Sid. 151.

(a) 1 Mod. 173.

that he paid Debts and Legacies, and delivered over to the rightful Executor all the residue of the Testator's effects on his coming of age.

These are the principal Pleas in this Action, and Evidence in support of which will afford a sufficient defence to the Defendant. It may, however, be observed in general, that almost every Plea which is good in Assumpsit in Discharge of a Debt, is Evidence in this Action; and by referring to them there, the Rules for settling the Evidence will be found at length.

CHAPTER IV.

OF SETTLING THE EVIDENCE IN THE ACTION OF COVENANT.

AN Action of Covenant must be founded on a Deed, and it must be so stated in the Declaration,^(a) *Non est factum* is pleaded in almost every instance. The Plaintiff must prove the execution of it by calling the subscribing witness; subject, however, to the exceptions before-mentioned in the preceding Chapter.—Vid. *ante*, page 134. for Cases in which it is not required to call him.^(b)

Covenants being for various purposes, it is impossible to put particular Cases, some few leading ones excepted. General Rules can only be given : therefore—

1. Where the Plaintiff assigns a breach generally in the words of the Covenant, and specifies how it has been done, his Evidence must correspond with his particular statement of the breach.^(c)

As where there is a Covenant “not to buy or sell for a given time, without leave of the Plaintiff :”^(d) and Plaintiff assigns a breach, that the Defendant did sell to A., B.,

(a) Esp. Dig. N. P. 320.

(b) 2 Stra. 814.

(c) 1 Esp. Dig. N. P. 331.

(d) 3 Term Rep. 308.

and C., he must prove that he did so, by proving sales to some of those particular Persons; and they are good witnesses to prove it: though other witnesses may be called to prove the same facts.

2. If there is any thing to be done by the Plaintiff, previous to what the Defendant covenants to do, he must prove by Evidence that he did it, or offered to do it.

As if the Defendant covenants to pay a certain sum of money, on the Plaintiff executing to him an assignment of certain Premises, the Plaintiff should prove, that he either did assign, by proving a Deed regularly executed and delivered, or that he tendered and offered such a Deed to the Defendant, which facts must be proved by a witness.

3. As the verdict in Covenant is for Damages, the Plaintiff should be prepared not only to prove a breach of the Defendant's Covenant, but also what sum will be a sufficient recompence to himself for the breach of it.

As in Covenant for not repairing a House, the Plaintiff must not only prove that the House was ruinous and decayed, but also what sum it would require to repair it, as that is the proper measure of his damages: this must be done by witnesses; otherwise he will get nominal damages only.

4. If the Plaintiff declares as *Assignee*, as it is necessary that he should state in his Declaration his whole title, regularly deduced from the Lessor or Grantor, so he must prove his whole title, as stated in his Declaration, by regular Evidence. If any step, or part of his title, is by

Deed ; he must call the subscribing witness to prove the execution ; if the Estate is fee simple, and he states himself as Heir, he must prove that he is so ; if as Devisee, he must produce the Will, and prove by the witnesses subscribed to it, its regular execution by the Testator ; if the Lessor, or Grantor, had an interest for years only, and one step is as Legatee, Executor, or Administrator, Probate of the Will will then be sufficient.

If the title is deduced by Marriage, it must be regularly proved, as before stated in Actions by *Baron and Feme*.

If the title is by a private Act of Parliament, there must be an examined copy produced from the Parliament Roll, and proved by a witness who examined it.

What will be Evidence in defence, by the Defendant, will be found *post*, under the head of, "The Evidence on the breach of the Covenant not to assign, &c."

5. If the Action is against the *Assignees of a Bankrupt*,^(c) the Plaintiff must prove that the Assignees took possession of the Premises demised, and kept the possession, not merely to try to ascertain the value of them, but as taking to the interest with a view to make it an efficient part of the Bankrupt's Estate : this is a matter of some difficulty in Evidence as to what shall amount to a taking to the Premises. The Plaintiff should, therefore, be prepared with witnesses to prove when the Assignees took possession, and how long they held them : what acts of Ownership they exercised. It is important, if the fact

(c) 1 Esp. N. P. C. 234. 7 East. 335. 3 Campb. 340.

took place, for the Plaintiff to show, that he applied to the Defendants the Assignees, for the possession, and that they either refused it, or gave him an equivocal answer.(f)

I shall now consider the Evidence in cases where the breach of particular Covenants is assigned.

1. *Of the Evidence where the breach is on the Covenant for Quiet Enjoyment.*

If the Plaintiff declares for a breach of the Covenant for Quiet Enjoyment, in a Lease from the Defendant to him:(g) it will not be sufficient for him to prove merely that he has been disturbed, or evicted, for that might be wrongfully by a stranger who would be subject to an Action for it ; he must go further, and prove that it was by some Person claiming by elder title. For this purpose, the Plaintiff must go into Evidence of the manner he was disturbed in the possession, and show under what colour it was done ; as, *e. g.* if he was evicted by Ejectment, he should show the Ejectment served, and the Judgment obtained on it, by producing an examined copy, and calling the Person who so recovered.

But in settling the Evidence, in this respect, the Covenant should be accurately looked to, as the usual form of it(h) now by the Lessor, is “ for Quiet Enjoyment against himself, and *all those claiming by, through, or under him ;*” in which case, though the Lessee was so disturbed or evicted, the Lessor might not be liable; unless the Plaintiff could

(f) 7 East. 339.

(g) 1 Esp. Dig. N. P. 297. Inst. 35. F. N. B. 242.

(h) 2 Bos. & Pull. 13. 15 East. 530.

prove, that the Person who disturbed him did claim by, through, or under his Lessor, the Defendant : this may be done by production of the proceedings, or by calling, as well in the last Case as in this, the Party who has made the Eviction to state the ground of his Proceeding.

Where a Lessee is so disturbed in his Enjoyment of the Premises demised, as by having an Ejectment served on him ; it is always prudent to acquaint the Lessor of such proceeding, and that in case of Eviction, he will be called upon under the Covenant ; if that has been done, and the Lessor has not defended the possession, and the Plaintiff has, in consequence, been evicted ; by giving Evidence of his having so given notice to his Lessor to defend, it should seem to be sufficient to show the Eviction only, without going into any Evidence of the title of the Person Evicting.

It has been stated, that the Plaintiff must show the manner in which he has been disturbed,⁽ⁱ⁾ for it is necessary that it should be done by some *act* ; for a verbal disturbance, as, *e. g.* by prohibiting his Tenant to whom he had underlet, not to pay Rent to him is not sufficient.

2.—*Of the Evidence where the breach is on the Covenant not to alien, assign, or part with the possession.*^(k)

In this case, if the Plaintiff proceeds on the latter part of that Covenant, after proving the Execution of the Lease; he has only to prove that some Person, not the Lessee, is in possession of the demised Premises.^(l) If he proceeds

(i) 1 Brownl. 81.

(k) 1 Esp. Dig. N. P. 300.

(l) 4 Taunt. 766.

on the former, he should call the Person, whom he supposes, or knows, to be the Assignee, to prove, that the Defendant assigned the Premises to him. He is not called upon to prove any Deed of regular assignment; as that belongs to the Assignee. But the Defendant, when so charged for having assigned, may show, that the Person who is in possession, or presumed to be in possession,^(m) is not an Assignee, but an under-Lessee only; to prove which, he must either prove the Lease made to him, by calling the subscribing witness, or by a witness who knows the fact; the under-Lessee himself is for this purpose a good witness. So he may show, that though the Premises were assigned, it was by his Assignees, in consequence of his becoming a Bankrupt;⁽ⁿ⁾ in that case he should produce the proceedings, and an assignment, by a *subpœna duces tecum* to the Assignee of the Term; and proving the execution of it proves his case. So he may show, that the Lease was sold by the Sheriff, under an execution against him; in that case he should give the Writ of *fi. fa.* in Evidence, by an examined copy, and then prove, by a witness, the sale by the Sheriff to some other Person, and, by a *subpœna duces tecum* to that Person, have the Bill of Sale from the Sheriff, and prove the execution of it by the Subscribing Witness.

So if the Lessor has accepted an Assignee as his Tenant, and he sues him, the Defendant may plead, that before the Covenant broken *he* had assigned to another: proving this, as in the cases just stated, discharges the Defendant.^(o)

(m) 1 Stra. 405. Dougl. 174.

(n) 3 Mau. & Selw. 353. (o) Dougl. 1 Ed. 438.

This Covenant is often, "Not to assign without the Lessor's leave in writing first had and obtained." In settling the Evidence, in that case, it must be observed, that a parol license is not good: there must be a license in writing; and it must be proved, at the trial, by a witness, to be the Lessor's hand-writing.

3. *Of the Evidence where the breach is on the Covenant to Repair, and Deliver up in Repair.(p)*

This is a question of fact, and to be tried by the testimony of witnesses, as to the state of the repairs. It is, however, laid down in a book of high authority,(q) that "ordinary, and natural decay is not a breach of this Covenant." It may, therefore, be advisable, in Settling the Evidence on this head, for the Defendant to prove, that though the premises are in a bad state, it has proceeded from natural decay. This is matter of opinion of Persons of skill, who should be called; but the Defendant must also show, that he kept the Premises otherwise in proper Repair, so that the decay was not caused by his neglect.

It is a usual Covenant for the Tenant to Repair, the Lessor finding rough timber. If the Tenant is sued on this Covenant, he may show, that he required of his Lessor to assign him, or give him, rough timber, which he refused, or neglected, to do; this may be proved by a Witness, who made the demand. If this is proved, it is sufficient Evidence for the Defendant, the finding the timber being a condition precedent.

(p) 1 Esp. Dig. N. P. 301.

(q) Fitzh. Abr. Title Covenant, fol. 4.

4. *Of the Evidence on the Breach of Covenant not to Plough Meadow ; and to use the Land in a Husbandlike way.*

In this case the Plaintiff must prove that the Land (of the breaking up of which he complains) was really Meadow at the time of the demise ;(r) this is done by a Witness, who knew it ; and he must then prove the fact of the Ploughing, and give Evidence of the amount of the damages.

As to the Evidence of using the Land in a husband-like way, vide *ante*, Chap. of Assumpsit, page 80.

Of the Evidence for the Defendants.

Under some of the preceding heads I have stated the Evidence for the Defendants. Such as what are the matters of defence on which a Defendant may rely, and under the other heads of particular Covenants. It may now be necessary to apply to the Evidence generally applying as matters of defence. It should, however, previously be observed, that where a Party has entered into an express Covenant, no circumstances, even of future impossibility from natural causes, can discharge him. Such as if a ship is chartered to sail by a certain day ; though from adverse winds it is impossible, it does not discharge the Covenant contained in the charter-party. He is, therefore, always in such case only discharged by the Plea and Evidence of performance ; as in the case

(r) 1 Stra. 610.

just mentioned, the Defendant would be forced to call a witness to prove the actual time of the ship's sailing, and that it was on the day mentioned in the charter-party.

2. The Defendant may plead, and show, in his defence, other Covenants in bar of those on which he is sued.^(s) These Covenants may be either in the Deed, on which the Action is brought, or in another. If they are in the same Deed, when the Plaintiff has proved the Deed, by the Subscribing Witness, by reference to the Covenant, the Plea may be supported ; as if the Action was Covenant for non-payment of Rent, and in the same Deed there was a Covenant that the Lessee might retain out of it, what was expended in repairs. The Defendant by showing that Covenant, and proving that he had expended in repairs to the amount of the Rent, by Witnesses, would be entitled to a verdict.^(t)

But if the Plea is, of Covenants in another Indenture in bar, that Indenture must be produced and proved by the Subscribing Witness. But this last Deed must appear to be intended to operate as a defeasance to the first, and to refer to it so in terms, or it will be no bar.

3. *Non est factum* is another Plea : (the Evidence as to which has been already treated of, *ante*, 151.) of which in an action of Covenant the Defendant may avail himself.

4. *Entry and Eviction* is also a good Plea in this Action, and has also been treated of before. But in the case of

^(s) 1 Esp. Dig. N. P. 327.

^(t) 1 Lev. 152.

Covenant, the Defendant is bound to prove by Witnesses that the Entry and Eviction was such as to prevent his performing the Covenant : for if it could be performed, the Plea will not be supported.(u)

Thus, *ex. gr.* If the Covenant was to repair the Dwelling-House, and Entry and Eviction pleaded : (x) and the Entry was into the backyard : this would not support the Plea, unless the Defendant also showed that by such Entry he was totally prevented from repairing the House.

5. *A Release*, is a good Plea in this Action : but to be available it must be by Deed, and which must appear to have been executed after the breach of Covenant was committed. For this purpose, the Defendant must have Evidence to prove the precise time of the Covenant being broken. He must then prove the execution of the Release by the Subscribing Witness, and prove that it was executed at the time it bears date, which must appear to be after the day of the breach just above-mentioned.

6. *Accord, and Satisfaction*, is a good Plea in this Action, as to which see the Rules of Evidence, *ante*, 160. It should, however, in the case of Covenant, be proved by Witnesses to have taken place after a breach of Covenant committed ; the time of which should be ascertained, as mentioned before, and the time of the Accord, and Satisfaction, be proved by a Witness, as well as the Accord, and Satisfaction, itself.

(u) Cro. El. 374.

(x) Bull. N. P. 165.

7. *Infancy*, is a good Plea in this Action, and decisive if proved : as to the Evidence, vid. *ante*, 122.

These are the principal heads of defence in which the Defendant may rely. *Non est factum* is generally pleaded with them : and the Defendant's Evidence is, of course, to be governed by his Pleas.

CHAPTER V.

OF SETTLING THE EVIDENCE IN ACTIONS OF ASSAULT,
AND FALSE IMPRISONMENT.

THESE Actions, and that of Trespass *vi et armis*, properly so called, being those usually brought against Magistrates, and Peace Officers, and those of the Excise, and Customs ; in all of which notice of Action, or some previous demand of the Warrant, or authority, under which the Defendant acted is required, and which, if not attended to, the Plaintiff will be nonsuited ; it must, therefore, be particularly observed in those Actions,—

1. That notice of an Action, intended to be brought against the Defendant, so circumstanced, must be given one month before it is brought by Stat. 24 Geo. II. c. 44.

2. A demand of a perusal, and copy, of the Defendant's Warrant must be made on him, if a Constable ; and he must have refused, or neglected to give it for six days by Stat. 24 Geo. II. c. 44.

3. Officers of the Excise, and Customs, must have one month's notice of Action by Stat. 23 Geo. III. c. 70., of all which, notices have been given, the Plaintiff must be

prepared with Evidence at the Trial. I shall, therefore, now proceed to consider :—1. *The general Evidence for the Plaintiff in those Actions.*

Every Imprisonment contains an Assault; and the Rule as to settling Evidence, is, in that respect the same. In these cases the Plaintiff in both Actions, in proof of his Declaration, is to go into the facts at full length, of the Assault and detention of the Person, proving the manner in which it was done : the violence or publicity of it : the extent of the bodily injury, if an Assault only, and the length of time the Plaintiff was detained, if false Imprisonment : the place where he was confined, if it was an unusual or improper place, or noisome or unwholesome, is matter also fit to be gone into ; and if special damage is laid, Evidence of that should be fully given.

If Husband and Wife are Plaintiffs or Defendants, the Marriage must be proved.

The Evidence for the Plaintiff must, therefore, necessarily depend on the various circumstances of the case and be governed by them. These general Rules should, however, be observed :—

1. That the Plaintiff, though his Declaration concludes, “ And other wrongs then and there did, &c.” cannot go into Evidence of any matter which might have been put on the Record as substantive matters of injury or complaint : for in such case they must be stated.(a)

(a) 1 Esp. Dig. N. P. 354.

As where the Declaration for False Imprisonment was in that common form of conclusion, “*and other wrongs, &c.*”; and the Plaintiff in one case wanted to go into Evidence to prove. “That during his confinement,(b) he had been stinted in his allowance of food,” it was held that it could not be done; and, in another case, where he wanted to go into proof of his having, during his confinement, caught the Gaol fever,(c) it was ruled by Lord Kenyon that such Evidence was inadmissible. *See post*, p. 217.

2. Where the Plaintiff’s Replication is the general one of “*de injuriâ suâ propriâ*,” he is confined to a disproof of the facts stated in the Plea, and cannot give in Evidence any extrinsic matter not contained in it.(d)

As where the Defendant, to False Imprisonment generally, justified the Arrest and the detention under a Warrant, it was held that the Plaintiff could not go into Evidence under that general replication, of a Tender and refusal of Bail.(e)

As, therefore, the facts to be proved by the Plaintiff, are of such limited extent, the important matters of Evidence in this Action occur in the defence. The important head, therefore, here to be considered is :—

The settling the Evidence for the Defendant.

The Defendant has three modes of defence by Plea.—

(b) Peake’s N. P. C. 46.

(c) Id. 62.

(d) 1 Esp. Dig. N. P. 354.

(e) 2 Black. Rep. 1165.

1. Of the General Issue *Not Guilty*.—2. *Of matter of Excuse*, as that the injury was done by accident; but which, as it may be given in Evidence under the General Issue is, therefore, rarely pleaded.—And, 3. *Of matter of Justification* in point of law.

In settling the Evidence, which may be given under the Plea of *Not Guilty*, it must be considered, as produced either as an answer to the Action, or in mitigation of damages, and in that view must be considered distinctly.

1. *Of the Evidence under the Plea of Not Guilty, as an answer to the Action.*

This in that respect is a denial of the facts stated by the Plaintiff as amounting to an Assault, Battery, or Imprisonment. It is the General Issue in these Actions, and puts the Plaintiff upon proof of his Declaration. In the case, therefore, of common Persons, the Defendants can only call witnesses to disprove the Plaintiff's case; and to prove that he is falsely charged with the injury complained of, by showing, for example, that the Plaintiff was mistaken in his person, and that the injury was committed by another: this is done by proving who actually committed the Assault on the Plaintiff, or that the Defendant was not present, or took no part in it.

But in the cases of Justices of the Peace, Constables, Parish Officers, and Officers of the Revenue, by several Statutes they are allowed to give a justification, or any special matter, in Evidence, without pleading it, under the General Issue only; these cases will be referred to hereafter.

2. Under this Plea of the General Issue, as matter of excuse may be given in Evidence, the General Issue only is in most cases pleaded: in fact, I have rarely known matter of excuse pleaded. It must, however, be made out in Evidence. *Inevitable Necessity* comes under this head, as well as accident; so is *Amicable Contest*; as if two wrestled for a Wager, and one was hurt by accident; if this is proved, it is good.

3. The important matter, in settling the Evidence for Defendant, is the Evidence which he is to give under the Plea of Justification. These Pleas are, of course, of great number and variety; I shall, therefore, apply myself to the principal ones only.

1. *Of the Justification of Son Assault Demesne.*

This is proved by the Defendant at the Trial, by showing, that before he assaulted the Plaintiff, the latter had assaulted him; it is not necessary that this should be by striking him, but by showing that he, the Plaintiff, was in the attitude, or about to strike or wound him, the Defendant, which he averted by assaulting the Plaintiff. It will not be sufficient for the Defendant to show a mere menace or threatening posture assumed by the Plaintiff, where the Parties were so far asunder that the Plaintiff could not reach the Defendant; he must show that he was within reach of the Plaintiff when assaulted: these facts must of course, be proved by some witness who happened to be present when the assault took place, and who can prove them in Evidence.

2. *Plea of molliter manus imposuit.*

This is a justification of an actual Assault, but which had been caused by the act of the Plaintiff himself, and which the Defendant was justified in making, either as preventing him from doing some act or resisting for some lawful cause; and the matters so justified, are of great variety, as—

If the Plaintiff came into Defendant's house without any authority, and refused to depart, Defendant may lawfully use force to expel him; and if, in such contest, the Plaintiff is assaulted and hurt, the Defendant can justify it by this Plea; in which case the Defendant must prove :—

That the House was his; that the Plaintiff came into it without his licence, and upon no lawful occasion; or if a Public House, into which he might lawfully come, that when there, he misconducted himself, made a noise or riot, or offended the other guests; that he was requested to depart, which he refused, and that it was necessary to have recourse to force to compel him.

These two last matters of Evidence must be attended to, and strictly proved; as to the first, Because no wrong is done, until the Plaintiff refuses to depart on request: and as to the second, the Plea must be referred to: for though an Assault may be justified by a refusal, if the Defendant justifies the battery, he must show a resistance on the Plaintiff's part, or opposition by force, for if he could be turned out of doors by mere force, (f) there

(f) 2 Stra. 1049. Vid. 5 Comyn's Dig. 3 M. 16. 8 Term Rep. 299.

was no necessity to beat or bruise him, and they can only be necessary, or warrantable, where he opposes the attempt by force, nor can a wounding, it should seem, under any circumstances be justified under this Plea.

So if a Plaintiff comes on Defendant's Close for any unauthorised purpose, and is desired to depart, which he refuses, force is justifiable under this Plea to compel him. In both cases, the Evidence is the same, and the better opinion seems to be, that there is no necessity for the Defendant to show his title to the House or Close, nor need he go into any Evidence on the subject, but that he may rely on the possession only ; but there are contradictory cases.

In all cases of Evidence under this Plea, it must be taken as a general Rule, that to warrant the Plea, the act of the Plaintiff was unlawful, and that the force and violence used by the Defendant to the Plaintiff was necessary and unavoidable : for under no other circumstances can force and violence be justified ; and the Defendant must give clear Evidence of both.

As, for example, if Plaintiff was diverting the Defendant's Water-course : (2 Roll. Ab. 547.) rescuing his Cattle, which Defendant had taken as a distress, or in execution : the Defendant must prove that the Water-course was his ; that he had lawfully distrained the Cattle, or taken the Plaintiff's Goods in execution ; in the one case by showing a Tenancy, or that the Cattle were damage feasant, and, in the latter, by proving an execution issued, and the Cattle seized under it by the Officer, and then that the Plaintiff violently and unwarrantably resisting,

was opposed by the Defendant, and in the course of such opposition received the injury for which the Action was brought.

These Rules apply to every case of this Plea.

If the Defendant justifies on the ground of moderately chastising an Apprentice or Servant, he must give Evidence that they are so, by showing the Indenture of Apprenticeship, and proving the execution of it : by showing the Plaintiff was his Servant and in his employment ; and he must give Evidence of the faults committed by them, such as disobedience of his commands for example, to show that the offence warranted the punishment he inflicted.

These Pleas apply more especially to Assault : as to false Imprisonment, they are more numerous, and these are chiefly matters of justification under some lawful authority. This may be in cases of Imprisonment where no process has issued, and where it has.

1. *Of a Justification of Imprisonment without Process.*

Under this head, it may be observed, that, as in most of the cases of false Imprisonment, Justices of the Peace, Constables, and all Peace Officers, as well as Officers of the Customs, and Excise, are Parties, it is not necessary to prove their appointment, but merely that they acted in those characters.(g)

(g) Phillips, Evid. 180.

If any Person makes a Riot, Assault, or breach of the Peace, he may be taken into custody, and given in charge to a Constable, or other Officer, to be brought before a Justice of the Peace; or the Constable, on his own view of such proceedings, may take him into custody. This being pleaded, the Defendant must call witnesses to prove a Riot, Assault, or Affray having taken place; that the Plaintiff was concerned in it; and that it was necessary, to prevent a repetition of the violence, that he should be taken into custody; that he was then given in charge to the Constable, or Peace Officer, under the charge. If the Constable is a joint Defendant, he is not called upon to prove his appointment: it is sufficient if he acts as a Constable. If he was present, and received the charge, as the offence was committed in his view, he would be clearly warranted in taking charge of the Plaintiff: and it seems too that, though not present, he can justify the detention. As, however, the Constable only takes charge of the Plaintiff to be dealt with according to law, the last proof must be, that the Plaintiff was brought by him before a Magistrate, and discharged, or committed.

If the Action is against a *Constable, Watchman, or Peace Officer*, for Imprisoning the Plaintiff, the Defendant must show in Evidence, at the Trial, the circumstances under which he took the Plaintiff into custody, such as being found under suspicious circumstances, with property supposed to be stolen, at an unseasonable hour of the night: these are good justifications for an Officer with a Warrant; and, if proved, will entitle the Defendant to a verdict.(h)

(h) 3 Taunt. 14.

So a Constable can justify taking a Party into custody, on a charge of felony, without any Warrant.(i)

In that case, he must show in Evidence, that a charge of Felony was preferred before him, and the Plaintiff was charged with it ; and if the charge was in writing, it should be produced : but he is not called upon to prove a Felony actually committed, for he will be justified, whether a Felony was committed, or not.

But if a Felony has actually been committed, either an Officer, or Private Person may justify taking a Person into custody, on fair grounds of suspicion.(k)

Commanding Officers of the Navy, or Army,(l) may also justify the Imprisonment of their Officers, Soldiers, or Crew for misconduct, which must be proved. And note, that it must, in every case of a justification for Imprisonment, be attended to ; that the Defendant must prove the ground of the detention of the Plaintiff's Person clearly, and distinctly, in every respect, on account of the jealousy with which the law looks on the Imprisonment of the Person of the Subject.

2. *Of Justification of Imprisonment under Process : this is of the Court, in civil Actions, or under Warrant of a Magistrate.*

1. *Of imprisonment under Process in Civil Actions.*

If an Officer, or private Person, justifies under Process,

(i) Dougl. 345. 3 Campb. 420. (k) 1 Esp. Dig. N. P. 353.

(l) 1 Esp. Dig. N. P. 354. 1 Term Rep. 537.

he must take care that it is not void, or irregular ; that is, that it is a good Writ, and regularly taken out, and returnable.(*m*)

If an Action is brought against an Officer, or *private Person*, for false Imprisonment, as, *e. g.* where the arrest was for Debt, they must plead a full justification under the Process of the Court.(*n*) Therefore, if it is by Process from an inferior Court, the Evidence must show, that the Party was subject to its jurisdiction ; and, under such *Plea by the Sheriff, or his Officer*,(*o*) the Defendant must produce, and prove, an examined copy of the Writ, or the Writ itself, which, it must appear, was returned ; the indorsement on which will show, for what sum the Defendant was to be arrested, or taken into custody : this is indispensable.(*p*) He must then show a Warrant made out to an Officer, and if the Officer is a Defendant, to him, which should be produced. The under-Sheriff can always prove the receipt of the Writ at the Office, and state to what Officer the Warrant was directed. The Defendant should, lastly, prove the arrest by such Officer ; and if any Person is joined in the Action with the Officer, he has a justification as coming in his aid.

If the *Plaintiff in the original Action*, or a Stranger, is either the Defendant alone, or jointly with the Officer, all the Evidence, last mentioned, must be given, and *also* an examined copy of the *Judgment* in the original Action, if the arrest is on final Process, and on which that Writ is founded.

(*m*) Vid. Cas. 1 Esp. Dig. N. P. 356. (*n*) 1 Esp. Dig. N. P. 356.

(*o*) 1 Stark. 413.

(*p*) *Drake v. Sykes*, 7 Term Rep. 113.

2. Of the Imprisonment under a Warrant from a Magistrate.

In Actions against Constables, it is, in order to settle the Evidence, necessary to see, when he is sued alone, or joined with the Justice of Peace : if sued alone, where the Justice should be joined with him, the Plaintiff must under Stat. 24 Geo. II. be nonsuited. But he may be sued alone,—1. Where he has no Warrant, but is acting by his own authority.—2. Where he was acting under a Justice's Warrant, but a perusal, and copy of it, having been demanded, he has not given a copy within six days, or before Action brought ; but where he has given a copy before Action brought, unless the Justice whose Warrant he had, is joined with him, the Plaintiff must be nonsuited. (q)

If the arrest has been made under a Warrant from a Justice of the Peace, the Warrant must always be produced in Evidence ; and this by Stat. 24 Geo. II. c. 44. is a justification to the Constable, though the Justice had no jurisdiction : but it must be proved to be the Warrant of a Justice of Peace for the County, and his signature to it must be proved to be his hand-writing : and this is given in Evidence under the Issue of Not Guilty, which is pleadable by that Statute.

Beside this Evidence, the Plaintiff's being by the same Statute required to give Evidence of a demand of the perusal, and copy, of the Warrant, and refusal of it for six days ; where a copy has been taken of it by the Plaintiff,

(q) Esp. Dig. N. P. 358.

the Defendant should always, at the Trial, have the demand in writing which was served on him of the perusal, and copy, ready to produce, and be prepared to prove the time of the service of it, and whether six days have elapsed from the time of the demand before Action brought: for which purpose, he should also have the copy of the Writ served upon him to produce, as on proving the actual time of the service of demand, and the Writ, it may nonsuit the Plaintiff: for although he may not have given a perusal, and copy, of the Warrant within six days after demand of it,^(r) which would deprive him of the benefit of the Statute, had the Action been immediately brought, yet if the Defendant gives a copy at any time before Action brought, he brings himself within the protection of the Statute.

The Constable is not called upon to prove the legality, or the illegality, of the warrant.^(s) The Justice of Peace, who issued it, is alone answerable for it: he is, therefore, by the Stat. 24 Geo. II. made a necessary Defendant, and, as the Constable, would be entitled to a Verdict, and his Costs, in consequence of producing the Warrant, if it is illegal, the Justice is made liable to pay the Costs which the Plaintiff would have to pay to the Constable.

As the suing out of the Writ is the commencement of the Action, the Plaintiff's Attorney is bound to have the Writ at the Trial to show the time of the actual commencement of it, by producing the first Writ, if there has been no *Alias*, which, in cases of notice to Justices, must be sued out within six months after the offence com-

(r) 5 East. 445.

(s) 2 Bos. & Pull. 158.

mitted. But as the Suit is often commenced on an *Alias* Writ, which issued after six months, the first not being served; though the suing out of the first Writ would save the Action: the production of the *Alias* would not. It is, therefore, indispensable for the Plaintiff's Attorney, in this case, to have at the Trial the first Writ, as well as the *Alias*, and show the first returned.(t)

Of Settling the Evidence for the Defendant in Actions against Justices of the Peace.

As to this is should be previously observed, that as the Defendant is entitled to a month's notice of Action, which the Plaintiff is bound to prove at the Trial; the same caution, as before stated in the case of Constables, is to be attended to in this case, as the Defendant may avail himself of the objection to the Action being brought too soon. Objections arising on the face of the notice, as to its illegality, are taken at the Trial.

The Defendant should, therefore, be prepared to prove the actual time when the cause of Action accrued, so that by comparing it with the Writ, it may appear, that the Action was not brought within six months after it; as, by Stat. 24 Geo. II. c. 44. if brought after that period, the Plaintiff must be nonsuited, vid. case of *Weston v. Fournier*, 14 East, 491.(u)

As the Plaintiff, however, gives the notice of Action, he is bound not to proceed within one month from that

(t) 7 Term Rep. 7. 6 Term Rep. 617. 14 East, 491.

(u) 1 Esp. Dig. N. P. 358.

time ; therefore the service of the notice ascertains when the month commences.(x) and the day of the service is inclusive.

2. The notice of the Action required by the Statute, being to enable the Justice to tender amends, and afterwards to plead it ; where he does plead it, he must show by Evidence, at the Trial, that he made a regular tender of the exact sum pleaded.

3. As a Justice of Peace may either commit, or seize, the Party's Goods, in consequence of a Conviction, or for something which has passed in his presence ; it may be necessary to consider them separately.

If the Action is for an illegal commitment by the Justice, in consequence of Proceedings before him on an Information, he must accurately prove the regularity of his Proceedings, and the Information laid before him, and the Proceedings on it : as these are taken in writing by himself, they must be necessarily produced and verified.

This occurs in the case of Convictions, and requires attention.(y)

If the Plaintiff has been convicted under a Statute before the Defendant, as a Justice of the Peace, and the punishment is Imprisonment, the production of that Conviction is sufficient Evidence for the Magistrate, provided it is good on the face of it.

(x) *Castle v. Burdett*, 3 Term Rep. 623.

(y) *Vid. Gray v. Cookson*, 16 East. 13.

So if the Action is for imprisoning the Plaintiff, by reason of not paying the penalty : the Magistrate is only required to produce his own Conviction, and prove the Proceedings before him, and his hand-writing to the Conviction. The Plaintiff may, however, in both cases, show, that on the face of it, it is bad in point of law ; in that case he will have a verdict.

Where, however, the Conviction has been quashed, as it then affords no justification, the Justice has then only to rely on the protection of the Stat. 43 Geo. III. c. 141, to show, that the Conviction, and Proceedings, were not done maliciously, and without probable cause ; in which the Action should be not Trespass *vi et armis*, but Case, which will nonsuit the Plaintiff.

In that case, the Defendant, the Justice of Peace, must bring forward Evidence of what passed before him when he made the Conviction ; and show by the facts which appeared before him, that he had convicted the Plaintiff on probable grounds, and not from malicious motives.

But as Justices of Peace may also commit for something which passed in their own presence, if an Action is brought for so doing, the Defendant must be well prepared to justify his own conduct ; such as :—

If he justifies a Committal, on account of the Plaintiff's having been guilty of a Contempt to him when in the execution of his Office, (z) he must be prepared to show what the Contempt was, by calling witnesses who were present, and heard what passed.

(z) 1 Esp. Dig. N. P. 354.

So he must not commit verbally, but by a Warrant, specifying the offence.(a)

So he may commit a Person for refusing to be bound over to the Assizes, or Sessions, as a witness on a prosecution for Felony.(b) In that case, the Defendant must give the charge in Evidence of the Felony, to show that there was ground for binding the Witness over; secondly, that the Witness's Evidence appeared to be material; and, lastly, that he was regularly called upon to enter into a Recognizance to appear at the Assizes or Sessions, and that he refused to become bound.

So he may commit a Person for not paying the penalty on a Conviction, to levy which a Warrant had been issued, and under which no levy had been made: if the Act, under which the Conviction takes place, require a previous return to it, "that no goods were found on which a levy could be made," and that after such return and non-payment the Defendant should be imprisoned; in that case, the Justice should give in Evidence the Conviction, the Warrant and the return as before stated, and then a demand on the Defendant to pay, his failure, and then the copy of the Warrant of committal.

But in the case of a Committal under a Conviction under Statute 13 Geo. III. c. 80.(c) for killing Game on a Sunday, the Justice may verbally commit, if the penalty is not then paid, and he has issued his Warrant to levy it, and to be kept in custody till the Warrant is returned.

(a) *Mayhew v. Locke*, 2 Marsh. 377.

(b) 3 Mau. & Selw. 1.

(c) 7 East. 533.

CHAPTER VI.

OF THE EVIDENCE IN THE ACTION FOR ADULTERY.

THE first step in Evidence, at the Trial of this Action, always is, to prove the Marriage of the Plaintiff with his Wife, whom he charges to have had criminal conversation with the Defendant.

In support of that fact, Evidence of reputation, cohabitation, the admission, or representation by the Parties themselves, is insufficient. There must be Evidence of the actual solemnization of the Marriage.

The usual Evidence of such Marriage, is the production of a copy of the Register of the Marriage Certificate from the books of the Church where the ceremony was performed, which must be examined with the original. But this may be rendered unnecessary, by producing a witness who was present at the Marriage, and can prove its having taken place : that is the best Evidence of the fact ; but as that is not always to be had, it will be sufficient to call Persons who knew the Wife before Marriage, and of course her maiden name, as described in the Certificate ; that she afterwards appeared as the Wife of the

Plaintiff, and by his name : the bare Register, without connecting the Parties with it, is not of itself sufficient ; for that the proof of their hands-writing in the book may be had.(a)

If the Marriage has taken place abroad, it must be proved that the ceremony was pursuant to the laws of the country, and the Marriage valid according to those laws : that is a question of law, or received public opinion, which must be proved as a distinct fact.(b)

So any Marriage among Sectaries, as Quakers, and the like, if good according to that particular religion, is a sufficiently good Marriage : but it must be proved that it was so received, as well as that the Marriage was solemnized according to the ceremonies of that religion.

But a copy of a Register, from a foreign Chapel, of a Marriage solemnized there, is not Evidence.(c) Nor are Fleet Marriages.

The fact of the adulterous intercourse between the Defendant and the Plaintiff's Wife must then be proved :(d) this of course, varies with circumstances ; and is usually proved by witnesses who have seen the Parties in a situation which precludes any doubt of the fact.

The last Evidence, in this case, goes to the damages, and these depend upon many circumstances ; as on the

(a) See Phillips. (b) Vid. *Leader v. Barry*, 1 Esp. N. P. C. 353.

(c) *Leader v. Barry*, 1 Esp. N. P. C. 353.

(d) *Reade v. Passer*, 1 Esp. N. P. C. 213.

situation in life of the Plaintiff; of the degree of happiness and comfort which he enjoyed with his Wife, and the degree of affection which they had previously entertained for each other; on the means by which the Defendant effected the Seduction, as if by being admitted into the Plaintiff's house as his friend or Intimate, and the abuse made of such confidence and situation; so that he was the Plaintiff's relative, and in that character received into the family without suspicion; and the Plaintiff's Wife had till then been considered as a woman of chaste morals and character, and that she had children and a family by her Husband. All these matters go in aggravation of the damages.

These facts are generally proved by *vivá voce* Evidence of Persons who were acquainted with, or lived in intimacy with the Plaintiff, and were acquainted with his mode of living and circumstances: but there is written Evidence also admissible.

Of this description are letters which have passed in correspondence between the Husband and Wife, where, from necessity, they were living in different places, as showing their affection for each other.^(e) This is, however, to be taken with caution, as capable of being adopted by collusion between the Husband and Wife to enhance the damages. The particular situation, therefore, at the time the letter passed should be clearly proved; such as that their separation was unavoidable in fact; to place the correspondence beyond suspicion.

(e) *Edwards v Crock*, 4 Esp. N. P. C. 39.

So letters written by the Defendant to the Plaintiff's Wife are Evidence against him.(f)

Of settling the Evidence for Defendant.

This is either as an answer to the Action on the Plea of Non Guilty, or in mitigation of damages.

As a defence, the Defendant may give in Evidence, that the Husband suffered his Wife to live openly as a common Prostitute.(g)

But his conniving at her Prostitution, with a particular Person, it is said, will only go in mitigation of damages : but Lord *Kenyon* thought it went to the ground of the Action.(h)

That learned judge was of the same opinion, that when Husband, and Wife, lived in a state of separation, the Action would not lie.(i)

He was, likewise, of opinion,(k) that if the Husband neglected his Wife, and lived openly in adultery with another woman, that he could maintain no Action for another committing adultery with his Wife. But Lord *Alvanley* held otherwise.(l)

In mitigation of damages, the usual ground taken by

(f) Bull. N. P. 28. (g) Bull. N. P. 27.

(h) Bull. N. P. 27. (i) *Weedon v. Timbrel*, 5 Term Rep. 357.

(k) *Wyndham v. Ld. Wycombe*, 4 Esp. N. P. C. 16.

(l) *Bromley v. Wallace*, 4 Esp. N. P. C. 237.

the Defendant, is the misconduct of the Husband himself.

His conniving at conduct in his Wife unbecoming a married woman ; suffering her to accompany the Defendant to improper places ; to be in company with him at an unseasonable time ; being himself brutal in habits, and cruel to, or negligent of, his Wife, or having turned her out of doors ; being instrumental to his own dishonour, as where he showed her naked in a Bath to the Defendant ; that she was a woman of loose character, and had been criminal with others.

These are facts which are only capable of proof by witnesses ; and these matters will suggest to what inquiry, in preparing Evidence on this subject, attention ought to be directed. Exculpatory Evidence is safe : but where it is attempted to fix misconduct, guilt, criminality, or neglect of the Wife, on the Husband, it must be clearly made out, or it will be dangerous.

CHAPTER VII.

OF SETTLING THE EVIDENCE IN THE ACTION OF REPLEVIN.

THIS being an Action of Trespass, for taking the Plaintiff's goods, and chattels, the General Issue, *non cepit*, denies the taking; and if the Defendant does so plead, he, the Plaintiff, is, of course, bound to prove the fact of his having done so.

This Evidence, however, seldom occurs, the Defendant by his Plea, Avowry, or Cognizance, admitting, and justifying, the taking: as by the Plea of Justification, that the goods taken were not the Plaintiff's, but Defendant's own, or the goods of a Stranger, by whose order he took them. This being a question of fact, the property must be proved to belong to whomsoever it is stated to be in the Plea.

The Avowry, or Cognizance, admits the taking of the goods in question; the first, on the Party's own right, the other as Bailiff, or Servant, and is for several causes, upon which the difference of Evidence must be observed, as—

1. *For Rent Arrear.*

This is the most important head in Replevin : and these Rules must be observed.—1. If the Avowry is for Rent arrear, the Defendant must first prove, that the Plaintiff was his Tenant, or Tenant to him named in the Cognizance, and held the Lands, or Premises, for the arrear of which the Distress is made, at the Rent stated in the Avowry : if there is a Lease, Evidence of these facts is completely made out, by producing the Lease, and proving the Execution of it by the Plaintiff, by the subscribing witness : if, however, the holding is by parol, the Defendant must prove the Tenancy, by showing payment of Rent, or an actual letting at the Rent stated in the Avowry, or Cognizance ; which may be done either by an agreement in writing, though not under a Seal, or by a witness who knows the facts.

If the Plaintiff holds as Tenant, under a Lease, it is absolutely necessary, that it should be consulted carefully in preparing the Evidence, as any variance between the Rent stated to be in arrear, or the holding will be fatal : if, therefore, on investigating the Covenants in the Lease, they are found to vary from the Avowry, or Cognizance, it should be amended.(a) Thus, *e. g.* if the Avowry stated the Rent to be paid quarterly, and it was half-yearly, it would be fatal. The same caution is to be used where the holding is not by Lease ; peculiar caution is, therefore, necessary in settling the Evidence in this respect.

2. It often happens, that the reservation of the Rent

(a) 4 Taunt. 320.

requires a demand to be made of the Rent before there can be a Distress made ; where that is the case, the Defendant must be prepared to prove that demand by a witness.

Wherever there is a penalty for non-payment of Rent, as for ploughing of old meadow, *ex. gr.* where the Rent is increased, the Defendant must prove a demand.(b)

3. The Defendant is not required to prove, that the exact Rent claimed by his Avowry or Cognizance to be due to him, is in fact in arrear ; for if he proves only part of it, it is sufficient. As he may avow for half a year's Rent as unpaid, and though he proves but a quarter due, he shall recover *pro tanto*.

4. Wherever the Plaintiff has paid Rent to the Defendant,(c) the latter, in Replevin, is never called upon to prove his title ; for in this Action, receipt of Rent is title to the Premises for the Rent of which he has distrained.(d) But as a Person may become entitled to a reversion with a right of Distress, and be obliged to distrain for it before he has received any Rent, in that case he must regularly deduce his title, and prove the whole of it by regular Evidence.

5. These are matters of fact, and proveable by *viva voce* Evidence. But where the Defendant has made Cognizance as Bailiff to any one, that Person, as Bailiff to whom, Defendant made Cognizance, cannot be a witness ;

(b) Hob. 133.

(d) 2 Wils. 208.

(c) Per Lord Kenyon, 1 Esp. N. P. C. 91.

for Defendant is but a Servant, and the Rent to be recovered by the Distress is on his account; he, therefore, is interested, and cannot be called.

Of the Plaintiff's Evidence in bar of the Avowry.

1. If the Plaintiff has never paid Rent to the Defendant, he may deny the holding "*non tenuit modo et formâ, &c.*" and put the Defendant on proof of his title. In that the Issue lies on the Defendant, and he must prove it by witnesses, or otherwise:

2. He may also deny that any Rent was in arrear, by proving payment, either by a receipt or otherwise, of all Rent due up to the last day of payment preceding the Distress made. This is under the Plea of *riens in arrere*, which if pleaded alone, admits the holding.

3. He may plead and prove a tender of the Rent due, which must have been before the Distress was made. This is proved as *ante*, page 111.

Of the Evidence under the Avowry for Damage feasant.(c)

1. Where Cattle are found trespassing on the Defendant's own land, or—2. On a Common to which he has a right. In this case, the question generally turns upon the fences being out of repair, and on whom the liability to repair lies; for if a man's Cattle strays into his neighbour's ground, and he is liable to repair the fences, he

cannot lawfully impound the Cattle ; and if he does, the owner may replevy them. As to liability to repair the fences, he who has the back of the ditch is bound to repair.

On the first point, the Defendant is required to prove, that he was in possession of the land where the Distress was made, and that the Cattle were there depasturing when taken, for if they escape out of Defendant's ground, he cannot follow them ; that they belonged to the Plaintiff ; and, lastly, the extent of the injury done to him.(f)

Questions on Common right require more proof.

The Evidence required there is, in the first place, that the Defendant was himself entitled to Common ; that is proved by showing that the place where the Cattle were found is the waste of the Manor ; that the Defendant is in possession of land, part of the Manor : and that the Owners or Occupiers of his land have been always used to turn in on it.

This is the case, where the Cattle taken are those of a Stranger. But a Commoner may also take the Cattle of another Commoner, which is the case only, where such latter Commoner has Common for a limited number only : in that case, the Defendant must show the immemorial usage of the Common ; that such Commoner was only so entitled to a given number and that more of his Cattle being found turned in than he was entitled to that the overplus only were distrained.

(f) 3 Esp. N. P. C. 95.

The right of Common being claimed by prescription, which is always stated in the Avowry, Evidence of that is essential to the Plaintiff's case. That prescriptive right is shown, by calling old witnesses, who remember the Common being used by the Defendant, or former Possessors of the Defendant's Estate, by turning in their Cattle, as far back as they can remember. Uninterrupted usage establishes this right, which is proved as is just stated. There may be also matters of Evidence to this effect found in the books of the Steward of the Manor.

It must be particularly attended to and observed in settling the Evidence in this case, that it precisely tallies with the prescriptive right as laid in the Pleadings; for any variation in a material part will be fatal.

As if the prescription stated by Defendant, was for *all* Commonable Cattle, and it was proved to be for Sheep and Horses only, the Defendant would fail.(g)

Of the Evidence when the Distress is for Tolls.

1. If the Toll is claimed for passing a public *Highway*, that is *Toll through*; in that case,(h) the Defendant must give Evidence of the payment of it from time immemorial, by the testimony of ancient Persons who remember it, and can speak to its having always been paid by Persons using the Highway; but that alone is not sufficient.(i) He must show, that he has done some public

(g) Bull. N. P. 59.

(h) 1 Esp. Dig. N. P. 382. 2 Wils. 299. Fitzh. 26. pl. 2.

(i) 2 Wils. 296.

duty or servic, such as repairing part of it; that is, there must be some consideration shown for claiming what would otherwise be an exaction on the Subject. And the Plaintiff must prove his prescription precisely in the terms it is laid.

If *Toll traverse* is claimed, the Defendant should show that the Soil, over which the way went, was his, and immemorial usage of the payment of the Toll, and that the Plaintiff was going over the way when the Toll was demanded.

2. If the Toll is claimed as due for *Fairs or Markets*, it may be claimed either by Grant from the Crown, or by Prescription, which supposes a previous Grant.

If it is claimed by *Grant*: the Grant from the Crown, must be produced and proved under the Great Seal ;(*k*) and that is sufficient to show the right of Defendant; and then the Defendant must prove that the Plaintiff was using the Fair or Market when it was claimed, that is, that he was exposing to sale some commodity usually sold there.

Toll of this description claimed by *prescription*, must be proved to have been paid from time immemorial, as before-mentioned, by ancient Persons.

If the Toll is claimed as due for landing Goods at

(*k*) Cowp. 661.

(*l*) 1 Esp. Dig. N. P. 384.

Ports or Quays, the Evidence is precisely similar to that in the case just mentioned of *Tolls on Highways*.⁽¹⁾

If the *Avowry* is for a *Heriot*, the Defendant must show the custom of the Manor: this is done by the Court Rolls, or Entries in the Steward's books, and showing the usage of paying it.

(1) 1 Esp. Dig. N. P. 384.

CHAPTER VIII.

OF SETTLING THE EVIDENCE IN THE ACTION OF
TRESPASS.1. *OF the Evidence for the Plaintiff.*

The Action of Trespass, properly so called, lies either for an entry on the Lands or Premises of another, and for some injury done there, or for taking his Goods. These points of preliminary Evidence are in all cases to be observed. (a)

1. That in Trespass for either, the Plaintiff must give Evidence of his being in possession. As if it is for breaking and entering his Close, that he was in possession of it when the Trespass was committed: if for taking his Goods, the same Evidence of being possessed of them should be given. These are matters of fact, and must be proved by a witness. (b)

2. That in Trespass for an injury done to the *Land*, the Plaintiff is not called upon to prove any title to it against a wrongdoer, but may rely on his possession only:

(a) 1 Esp. Dig. N. P. 397.

(b) 4 Term Rep. 489.

but if it is Trespass for taking his Goods, the Plaintiff must prove a property in them.(c)

But this property need not be the actual property in the Goods; a special property is sufficient. As the Sheriff may maintain Trespass for taking away Goods which he had taken in execution: so may a Carrier for Goods delivered to him to be carried.(d)

3. Where the Plaintiff sets out the Abuttals of the Close, in which he complains of the Trespass being committed,(e) he must prove them accurately as laid; that is, he must prove, that what he describes as the abuttal to the East is to the East; for should it turn out to be to the North, or any other point, he would be non-suited. And in a late case,(f) where Plaintiff described the land as abutting to the East on land of A. B.; in fact, A. B. was not the Owner of that piece of land, but another Person: the Plaintiff was non-suited. This is matter of parol proof, by witnesses who know the Close in question, and the bounds of it.

4. If the Trespass is for breaking and entering his Close, the Plaintiff must prove *the Parish laid* in the Declaration to be that in which the lands lie; where this question is raised, it is generally proved by witnesses who have either perambulated the Parish, or by Persons who have served Parish Offices, or collected the Taxes, and so are acquainted with its boundaries.

5. If the Declaration states the Trespasses as commit-

(c) 1 East. 244.

(d) Cro. Eliz. 639.

(e) Bull. N. P. 86.

(f) *Ironmonger v. —* Surry Lent Assizes 1818.

ted "at different days and time between the day of, &c. and the time of commencing the Suit:" if the Plaintiff goes for damages for the time laid, he must show for how many days or months the Defendant continued the Trespass.

6. In the case of a New Assignment, if it is of a different place from that laid in the Declaration, the Plaintiff must confine his Evidence to the place laid in the New Assignment.(g) In settling Evidence, therefore, on an Issue so joined, it will be unnecessary to bring any Evidence as to the first laid place.

7. In Trespass for taking Goods, (h) the Plaintiff's Evidence is confined to these Goods only mentioned in the Declaration. If he, therefore, *ex. gr.* complained of the taking of his Oxen and Sheep, he could not give Evidence of taking his Horses.

8. If the Action of Trespass is joint against several Defendants, the Plaintiff cannot have a joint verdict against all, unless he proves the Trespass done when all of them were present at the same time. He should, therefore, endeavour to get Evidence of such joint act; for though he may have a verdict against one only, if there is a verdict for any of the joint Defendants, he must pay his Costs.

9. The conclusion of the Declaration in Trespass being,

(g) *Foster v. Crouch*, Cro. Eliz. 492.

(h) Bull. N. P. 24.

(i) 1 Esp. Dig. N. P. 427.

“And other wrongs to the said Plaintiff then and there did,”(i) it might seem that these general words would admit of the Plaintiff’s giving Evidence of any wrong connected with the Trespass: but it is not so; it is confined to cases only of aggravation, matters which would not of themselves bear an Action, or which could not with decency be put on the Record.—*See ante. p. 152.*

As in Trespass, for breaking and entering the Plaintiff’s house, and taking his Goods, it has been already observed, that he cannot give Evidence of taking any Goods not specifically laid in the Declaration, but he can give in Evidence, that the Defendant while there, behaved with great indelicacy or rudeness to the Plaintiff’s family. This may direct the settling of the Evidence in these points, and prevent the loading of the case with what is unnecessary or inadmissible.

I shall now consider the Evidence applicable to the different heads of this Action, and how the Evidence applying to each is to be settled.

The Pleas are only, *Not Guilty*, and a *Justification*.

1. *Of settling the Evidence in Actions of Trespass arising from cases of Tenancy.*

1. The most usual Actions of this description are cases for an irregular Distress.

Under this head, as the Plaintiff need only prove the

(i) 1 Esp. Dig. N. P. 427.

taking of the Goods stated in the Declaration, by calling a witness to prove the fact and the value of the things taken : the Evidence lies on the Defendant to prove a Justification.

Where the Tenant brings his Action for such Cause, there is no justification ever put on the Record, the Statute 11. Geo. II. c. 19. s. 21.(*k*) allowing the Defendant to plead the General Issue, not Guilty, and to give in Evidence the special matter of Justification ; that is, the taking of the Goods as a Distress for Rent. That is done, by showing generally that the Plaintiff was Defendant's Tenant at a certain Rent, and that it being unpaid, he, or a Person authorised by him, entered and seized the Goods ; that he gave the notice of Distress required by the Statute ; had the goods regularly appraised and sold, as the case may be, pursuing the directions of the Statute more particularly stated below.

2. The Plaintiff's case usually turns upon some irregularity in the Distress, which, if he succeeds in establishing, he is entitled to a verdict. He usually gives a general Evidence only, that of a taking of his Goods and selling them, leaving the Defendant to justify the regularity of his Proceedings under the Distress ; in that case, he must be prepared, first, to show the Tenancy as above stated. The cause of taking is usually proved by the Broker by whom the Distress was made, if not a Defendant : if he is, the Defendant must call some other witness.

He must produce and show a copy of the notice of Distress, and prove it to have been served on the Plaintiff,

(*k*) 1 Esp. N. P. C. 257.

or left at his house, and signed by the Defendant, whose hand should be proved : this specifies the taking, and cause of taking. and that if the Goods were not replevied within five days they would be sold, concluding with an Inventory of the things taken ; the Plaintiff should have notice to produce the original left with him ; the Defendant should next be prepared to show the regularity of his Proceedings as directed by Statute,(1) viz. that the Goods taken were appraised at the five days' end by two sworn Appraisers, sworn before the Sheriff or Constable ; that the Goods were sold for the best price which could be got after such appraisement made ; and if there was an overplus, that it was left with the Sheriff or Constable.

But the Plaintiff may go into his case at once ; and after producing the notice of Distress, and proving the Defendant's hand to it, he may then show, by a witness, the irregularity of the Proceedings ; as, for example, that they were sold before the end of the five days, or that the Appraisers were not sworn.

3. Where Goods have been clandestinely removed to avoid a Distress, and the Landlord seizes them within the thirty days, Actions of Trespass are often the consequence. In this case, the Landlord, (who is the Defendant,) is bound to prove, after the Defendant has given Evidence of the taking of the Goods ; that the Plaintiff was his Tenant ; that the Goods in question which had been on the Premises would, had they remained, have been liable to be distrained ; and they were clandestinely carried off the Premises, of which, proof that the removal took place at

(1) Stat. 2 W. & M. Sess. 1 ch. 5.

night, or very early in the morning, is the best. The presumption is then raised, on which the Jury are to decide, whether they were fraudulently taken away to avoid the Distress or not; and as the Statute gives the Landlord a right to follow the Goods for thirty days only, he should be prepared with proof of the actual day on which he seized them. The Defendant should be well prepared with proof by witnesses, as to the time and manner of the removal, and that it was suspicious; as, if *bônâ fide*, or with Defendant's knowledge, the Action will lie.

4. If the Tenant brings an Action of Trespass for taking his Goods, which the law considers as exempt from Distress under particular circumstances, such as Wearing Apparel, Beasts of the Plough, or the like; the Defendant, the Landlord, must be prepared with Evidence to show that there was nothing else on which he could make a sufficient Distress, and that will justify the taking: but that is an Action of Trespass on the case.

2. *Of Actions of Trespass for injuries to a Fishery.*

Where any Person is entitled to a free or several Fishery, he may maintain this Action for entering it and taking his Fish.^(m) The Plaintiff's title in both cases is claimed by Grant from the Crown, or by Prescription, which presupposes a Grant. If the Plaintiff is in possession by Grant, he must produce it; if not, he must call ancient witnesses to prove, that his Predecessors in the Estate always had and enjoyed the right as claimed.

(m) 1 Esp. Dig. N. P. 401.

3. *Of settling the Evidence in Actions of Trespass arising from the pursuit of Game.*

Actions of Trespass, arising from the pursuit of, or for the protection of Game, are very frequent.⁽ⁿ⁾

If an Action is brought by the Owner, or Tenant, of the soil, against a Person for riding or going over it, or digging and breaking it, the Defendant may justify the doing so.—1. By giving in Evidence that he was in pursuit of ravenous beasts, as Foxes, Badgers, &c. :^(o) but that will not justify him in breaking the ground; in doing unnecessary injury to the fences or ground; or in following animals not of that description. This justification, therefore, may be so answered by Evidence on the part of the Plaintiff, which should show what Game the Defendant was in pursuit of, and that it was not of beasts of that description; and show the breaking of the ground, by witnesses who saw the Game pursued, or the digging of the earth; which must be proved to be the Plaintiff's soil, and then in his possession.

But it is no justification to a Party coming on the ground of another, that he is Lord of the Manor, or qualified to kill Game; that only exempts him from the penalties under the Game laws.

If an Action is brought for entering the Plaintiff's house to search for snares, or engines for destroying Game, and taking Plaintiff's guns or nets,^(p) the Defendant

(n) 1 Esp. Dig. N. P. 403.

(o) Cro. Jac. 321.

(p) 1 Esp. Dig. N. P. 403.

may justify under the Warrant of a Justice of Peace, granted to him for that purpose, under Statute 22 and 23 Car. 2. c. 26. To make that a good Justification, the Defendant must produce in Evidence the Proceedings before the Justice; that is, prove the Information, and the Justice's Hand and Seal to the Warrant; and if any guns, nets, or snares, were seized; that they were found in Defendant's possession.

If a Party sues or justifies as a Gamekeeper to the Lord of a Manor, he must produce and prove his Deputation from the Lord, and prove that he was sporting within his own Manor.

4. *Of settling the Evidence in Trespass against the Sheriff or his Officers.*

Under this head it must be attended to in settling the Evidence:—1. That in all cases of Trespass *de bonis asportatis*, under an Execution, the Evidence must be brought home to the Sheriff through the medium of the *Warrant to the Sheriff's Officer*; nor will it be sufficient to show, even by the Evidence of the under-Sheriff, that the Person who seized the Goods was in fact an Officer, and the Warrant directed to him.(g)—2. That if the Plaintiff in Trespass is the Defendant in the original Action whose Goods were seized, it is sufficient for the Sheriff to show his Warrant: but if the Action is by a Stranger whose Goods have been taken, the Sheriff must show an Office copy of the Judgment in the Cause he levied.(r)

(g) 7 Term Rep. 113.

(r) 5 Burr. 2631.

The Evidence, as to proceeding against the Sheriff, has been already treated of in other Actions, *ante*: but in this Action of Trespass *vi et armis*, the questions which usually occur are—as to the *property of Goods taken in execution*: in these Actions the Sheriff is only a nominal Defendant. It is sufficient here to observe, that the only point to be attended to is, in whom is the *actual property* in the Goods: apparent property, or acts of Ownership, exercised over Goods by the Defendant, will not entitle the Sheriff to take them in execution, but that proof of property lies on the Plaintiff. But *vide post*, ch. of Trover in cases of Bankruptcy.

5. Of the Evidence in Actions of Trespass against Officers of the Excise or Customs.(s)

1. As the Action must be brought against these Officers, for any thing done in the execution of their duty within three months,(t) the Plaintiff's Attorney should always have the Writ in Court, and be prepared with proof of the time of the actual service of it, to ascertain if the three months have run since the offence committed.(u)

2. The venue must be laid in the County where the offence was committed.(x) In making up the Evidence therefore, it is necessary to ascertain, with precision, the place where the Officer seized the Goods, and to see that it is in the County laid in the Declaration.

(s) 1 Esp. Dig. N. P. 408.

(t) Stat. 17. Geo. II.

(u) 2 H. Black. 14.

(x) Same Stat.

3. As a notice of Action is required to be given by the Statutes, referred to below, (y) which notice is to express clearly the cause of Action, and the name and place of abode of the Plaintiff and of his Attorney, and to be served one month before Action brought, the Plaintiff must have at the Trial of the Cause, the witness who served the notice, and compared it with the copy produced; and can swear to the copy served, which the Defendant should have notice to produce, and then have the Writ in Court if called for.

4. The necessity of collecting the Revenue, making it necessary that Officers should have the power of entering Houses and seizing Goods, which are presumed to be contraband; the time, place, and manner of seizure, must be attended to, and the Plaintiff must be prepared to rebut the Evidence which the Defendant may bring forward, which is as follows :—

1. The Defendant may show, that he entered under a Writ of Assistance out of the Court of Exchequer, which must be produced and proved: he must then prove that he entered the House in the day time, and was accompanied in the search and seizure by the Constable of the place where the Plaintiff's House is situated, and where he seized the Goods in question.

This Evidence would be conclusive: but the Plaintiff may defeat it, by showing that the Officer was alone, and

(y) Stat. 23 Geo. III. c. 70. s. 30. and 24 Geo. III. Sess. 2. c. 47. s. 35.

unattended by any Constable ;(z) or if he was attended by a Constable, that he was not the Constable of the place where the seizure was made ;(a) if no Goods are found, the showing that fact in Evidence, has been held to entitle the Plaintiff to recover in Trespass for the breaking and entering his House ; but that has been overruled, where the Defendant has entered under a Warrant granted by two Commissioners : the Officer should, therefore, on those occasions, give in Evidence the Warrant, and prove the Commissioner's hand-writing to it.(b)

2. If the entering and seizure is made at night, the Officer must also be accompanied by the Constable or Officer of the place, or he will be a Trespasser. He must, therefore, prove that fact.(c)

3. If the Goods taken have been condemned in the Exchequer,(d) the Officer should give in Evidence an examined copy of the Judgment of Condemnation there, and that is conclusive Evidence for him. That copy must be proved by a witness who compared it with the original.

But a condemnation of the Goods by an inferior jurisdiction, as by the Officers of the Excise or Customs, is not sufficient.(e)

4. If the Officer seized any Goods liable to Duty,

(z) 3 Wils. 61.

(a) 2 Wils. 405.

(b) 1 Term Rep. 535.

(c) St. 8 Anne, c. 9. 10 Anne, c. 19. s. 12.

(d) 2 W. Black. Rep. 977. (e) 2 W. Black. Rep. 1174.

which in fact are not forfeitable, (*f*) he must show that they were on board a Boat and no Officer with them, or coming by the waterside, on circumstances of credible information. This is matter of *vivâ-voce* proof by witnesses who saw the seizure made.

5. And if an Officer justifies a search under a Justice's Warrant, (*g*) though it recites an Information made before the Justice, the Warrant is sufficient Evidence without producing the Information, which Warrant he must regularly prove.

For Evidence under a Justification by an Officer, see *ante*, False Imprisonment, and see 1 Esp. Dig. N. P. 422.

The general Pleas in this Action are—

1. *A Release*, which is a good Plea in this Action ; (*h*) and if there are more Defendants than one, a Release to one will be good as to all. The Evidence of this is by Deed, and the execution must be proved by the subscribing witness.

2. *A recovery in another Action for the same Trespass*, which is also a good bar ; (*i*) to support the Plea to that effect, the Defendant must give in Evidence, by the examined copy, the Judgment obtained in the former Suit, and prove that the cause of Action was the same. (*k*)

(*f*) Stat. 6 Geo. I. c. 21.

(*g*) MSS. 1 Esp. Dig. N. P. 428.

(*i*) Cro. Eliz. 30.

(*h*) Hob. 66.

(*k*) 3 East. 346.

3. By Stat. 21. Jac. I. c. 16. *Disclaimer and tender of amends before Action brought*, is a good Plea. To such a Plea, the Defendant must bring Evidence to prove, that he committed the Trespass by mistake, and, of course, that it was involuntary: he must also prove the Tender of the precise sum pleaded, in the usual way, and then call witnesses to prove that the sum he tendered was a full compensation for the injury he did.

4. The General Issue in this Action is, *Not Guilty*; and under it the Defendant may give title in Evidence; ^(l) that is, he may show, that the land is his, not the Plaintiff's: as if a Tenant for life died who had let the land to Plaintiff, and his successor let it to the Defendant who entered on it, ^(m) he may show his right to do so, under the Plea of the General Issue. So he may show, that he held under a good lease which is unexpired; in which case he must produce and prove the Lease by the subscribing witness.

But the Defendant cannot, under that Issue, give in Evidence matters of excuse: as accident, inevitable necessity, negligence of the Plaintiff himself, or the like. ⁽ⁿ⁾

In this Action, the boundaries of property separated by a Ditch often comes in question. In that case, the rule of law, as laid down by Judge *Lawrence* in the case of *Vowles v. Miller*, ^(o) is, that the edge of the

^(l) 7 Term Rep. 354.

^(m) 8 Term Rep. 403.

⁽ⁿ⁾ Esp. Dig. N.P. 429.

^(o) 3 Taunt. 137.

Ditch is the boundary of his land who owns the back of it.

In Trespass *de bonis asportatis*, as the Plaintiff is confined in his Evidence to the particular Goods mentioned in the Declaration, (p) in settling the Evidence, therefore, for the Plaintiff, these only are to be attended to.

(n) Bull. N. P. 84.

CHAPTER IX.

OF SETTLING THE EVIDENCE IN THE ACTION OF EJECTMENT.

IN settling the Evidence in this Action particular accuracy is necessary, as the Plaintiff must recover by the strength of his own title. It must be taken to be a *general rule, that, in every case*, the Plaintiff must be prepared with Evidence to prove that the Land, or Tenements, which he seeks to recover by Ejectment, have not been held adversely to him for twenty years; or rather he must prove, that he, or those under whom he claims, have been in possession within that period ;(a) (this arises under the Statute 21 Jac. I. c. 16.) unless he can bring himself within some of the legal exceptions given by that Statute, as Infancy; in which case he must prove the time of his birth; that he was *non compos, imprisoned, or beyond sea*: each of which facts must be distinctly proved before he can go into his case, if the twenty years have run; and in the case of a woman being Plaintiff, she must show that she was *Covert* during the twenty years, by proof of an actual marriage as before stated, *ante*, 113. All this is matter of parol Evidence, as the Plaintiff may

(a) 1 Esp. Dig. N. P. 440.

show his possession, either by the actual occupation of the Premises by his Ancestor, under whom he claims, or by himself, or if by a Tenant, by proof of Rent having been paid to him, or to his Ancestor. If he is unable to give positive Evidence to this effect, he must abandon his Action.

The next general rule to be observed is, to see that the Plaintiff has laid his demise in the Ejectment, *after* his own title has accrued; for this purpose, in every case, the day of the demise, laid in the Declaration in Ejectment, must be first and carefully looked to, as well as the time when the Lessor of the Plaintiff's title or right of entry accrued, for the demise must be subsequent to it. As *e. g.* if a Tenant was bound to quit at Michaelmas, and not having done so, his Lessor brings an Ejectment to recover the possession; as the Lessor had no title to the possession till after the 29th of September, he must lay his demise subsequent to that day; that is, as his title commences on the 30th of September, from which time only he has a right to the possession of the lands, the demise is usually laid on that day, or on the 1st of October, to hold from the 30th of September.

1. The principal cases in Ejectment are between Landlord and Tenant.—2. By a Mortgagee.—3. To obtain possession under an Elegit.—4. For Copyhold Premises.—5. By a Devisee.—6. By the Heir at Law. These will be distinctly considered.

1. *Of the Evidence in cases between Landlord and Tenant.*

1. If the Ejectment is brought by the Landlord, on the ground that the *Tenant held over after the expiration of the Lease* under which he held, the Plaintiff must produce and prove the Lease, and the execution of it by the Tenant; and then the Term originally granted will appear by references to it, and, of course, its expiration by the effluxion of time: by that Evidence, the Plaintiff shows his right to the possession, and that the Defendant was wrongfully in possession.

2. If the Ejectment is founded on a *notice to quit*, the Plaintiff must prove that Defendant was his Tenant; that he paid him Rent; and give some Evidence, that his holding commenced at some time, or feast, prior to the day laid in the Declaration: this may be done by giving notice to produce receipts, and proving either by them, or other Evidence, the payment of Rent by Defendant, for Rent due at some quarter or half year. He must then prove a regular notice to quit, corresponding with the Defendant's holding; that is, if the Defendant's holding ended at Midsummer, the notice must be to quit at Midsummer. He must prove that this notice was to quit at the regular time, and served on the Defendant at least six months previous to the expiration of his holding. This notice is proved, by giving the Defendant notice to produce that served on him; and the Plaintiff must, in case the service is not admitted, call the Person as a witness who served the notice, who should produce a copy of that served on the Defendant, which he must swear was a copy, and prove the time of actual service on the Defendant, or the leaving

it at his dwelling house, so that it may appear to be more than six months previous to the end of Defendant's holding.

As questions are often raised on the validity of this notice, it must be observed, that it is essential to its validity.(b)

1. That it be signed by the Party entitled to the possession, and by all who are so entitled :(c) whose hand-writing to it should be proved.

But a notice to quit, given by a Receiver of an Estate, under the Court of Chancery, would be good ; but he should show his appointment.(d) And the witness, who served the notice, or some other, should be prepared with proof of his signing or hand-writing.

2. It must be served six months previous to the time required by the Lessor of the Plaintiff for Defendant to quit, and must end with the year of Defendant's holding. But if served on the day after any Quarter day ; as, for example, the 30th of September, to quit on the Lady-day following, it will be good.(e)

If the notice to quit is witnessed by any Person, he must be called ; and no parol Evidence will be admitted to show, that the Tenant read or understood the notice.(f)

(b) Esp. Dig. N. P. 467.

(d) 12 East. 57.

(f) 2 Mau. & Selw. 62.

(c) 5 East. 498.

(e) Esp. Dig. N. P. 467.

3. It must express the time when the Defendant is to quit, as Michaelmas-day, Lady-day, or the like.

But if the notice is for Michaelmas or Lady-day, it means the 29th of September or 25th of March, being the new Style ;(g) and parol Evidence is inadmissible to show, that where the notice said Michaelmas, it meant old Michaelmas-day ; and it must be to quit all the demised Premises, and not any part of them.(h)

4. It must be *served* on the Tenant of the demised Premises, or at his house, which will be sufficient : (i) proof of which must be made by the Person who served it ; and if there be *Joint-tenants* of the Premises, service on one on the Premises will be sufficient.(k)

When there are *under Tenants*, the Landlord is not obliged to serve any notice to quit on them, it is sufficient to give his own Tenant notice to quit ; and when he obtains Judgment against him, the Sheriff will turn out all the under Tenants.(l)

3. The third case of Ejectment, between Landlord and Tenant, is, where it is for *non-payment of Rent, or breach of Covenant.*

This, for non-payment of Rent, is by Statute 4 Geo. II.

(g) 11 East. 312.

(h) 14 East. 247.

(i) 4 Term Rep. 464.

(k) 7 East. 551.

(l) Per *Mansfield*, C. J. 2 Bos. & Pul. N. R. 330. et Vide 14 East. 234.

c. 4. when by the terms of the Tenant's holding, the Landlord has reserved to himself a right of entry in case of half a-year's Rent being in arrear; for this purpose, the Lessor of the Plaintiff must produce and prove, by the subscribing witness, the lease under which the Defendant held. That being referred to, the reservation of the Rent, and the right of entry claimed by the Landlord, will appear; the Affidavit of the half year's arrear of Rent is made before the Ejectment is brought; but proof of it may be given at the Trial. But the Plaintiff is required to give further Evidence; that is, he must either prove by a witness, that he demanded the Rent upon the Land. or Premises, at a convenient time before sunset of the day the Rent became due, and that it was not paid; *(m)* or he must prove in the same way, that there were no goods, or property, on the Premises, sufficient to answer the Rent in arrear.

Without this Evidence, in an Ejectment brought for non-payment of Rent, the Plaintiff will be non-suited.

If the Ejectment is brought on *the Covenant for re-entry for breach of any other Covenant* in the Lease, the Plaintiff must first prove, as before, the execution of the Lease by the subscribing witness; then, by reference to the Lease, the Covenant will appear for the breach of which the Plaintiff brings his Ejectment.

The Plaintiff must then give Evidence of the breach of that Covenant; and then his right of entry appears by the Lease, and, of course, his right to recover. Thus if the

(m) 7 Term Rep. 117.

breach of Covenant complained of is, that the Defendant ploughed up old meadow, he must show that the meadow broke up was ancient meadow, and that the Defendant ploughed it up, or broke it up.

In cases of Ejectment for breach of Covenant, a Judge will make an order for a Particular of the breaches the Plaintiff goes for; and, at the Trial, the Plaintiff will not be allowed to go into Evidence of any other. This order should be obtained in every case, as the Defendant will know how to regulate his Evidence, and confine it to such points only as—

If the *Ejectment is for non-payment of Rent*, proof of the payment lies on the Defendant; and though the right of entry is in the words of the Lease given for non-payment of Rent, "*being lawfully demanded,*"⁽ⁿ⁾ three Judges, against one, decided, that the Lessor was not called upon to prove a previous actual demand of it before he brought his Ejectment; that Evidence is, therefore, unnecessary.

These are cases where the relation of Landlord and Tenant is clear, and the Action of Ejectment comes on to Trial, by reason of the Defendants wrongfully keeping possession after the determination of their Tenancy. But there are cases where the Landlord may maintain an Ejectment without any notice to quit.

1. If the Defendant *disclaims* to hold of the Lessor of the Plaintiff, and sets up a title in himself or as holding under some other Person. In that case, no notice to quit

(n) *Doe v. Alexander*. 2 Mau. & Selw. 525.

is required ; but the Lessor of the Plaintiff must go into his title, and prove it regularly ; for the Defendant being in possession, the Plaintiff must recover by proving himself entitled.

2. If the Tenant has held under a Lease made by a Tenant for life, who is dead, or who had power to make Leases which have not been well executed, (o) the Person entitled in remainder or reversion may maintain an Ejectment against the Tenant in possession. But in such case he must prove his title to the Premises by regular Evidence ; in which case, if the Tenant sets up any Lease, it is answered by showing, that the Lessor who made that Lease was only Tenant for life, and that he was dead ; ha he was only Tenant for life, will appear from the Title Deeds which the Plaintiff must prove in support of his title ; or if he had power to make Leases, under which the Lease relied on by the Tenant was made, the Plaintiff may show that he did not pursue the power, and in what respect, and that, of course, his Lease was void.

This is the case, where he in reversion or remainder has never accepted Rent from the Tenant ; for if he has, (p) though it does not set up the Lease, it makes the Tenant a yearly Tenant, and as such entitled to a notice to quit ; which, in such case, must be proved as before stated, or the Plaintiff cannot recover.

3. Where the Lease has expired by effluxion of time, and the Tenant continues in possession, no notice to quit is required, but the Lessor may immediately proceed by

(o) Esp. Dig. 7 4.

(p) 7 Term Rep. 83.

Ejectment : but if he receives Rent for any time after the expiration of the Lease, the Tenant then becomes a yearly Tenant, and entitled to notice to quit.

4. Where a Mortgagor has made a Lease or Demise subsequent to the Mortgage, the Mortgagee may bring an Ejectment without giving any notice, for the demise is absolutely void.(q)

5. Where an entry is given for breach of Covenant, no notice to quit is required.

In Ejectment, between Landlord and Tenant, it may be taken as a general rule, that the Tenant cannot dispute his Landlord's title after he has paid him Rent, but he may show his Landlord's title expired ; as if he was Tenant *per auter vie*, he may show that Person dead.

Of the Evidence by the Defendant in Ejectment.

It is sufficient for a Defendant to prove a title out of the Plaintiff, though he proves none in himself, in all cases ; and first, as between Landlord and Tenant, or other Persons claiming the Land as Owner.(r)

1. The Defendant, on proof of the notice to quit being made by the Plaintiff, and if specifying a particular day on which the Defendant was to quit, may give in Evidence that *his Tenancy commenced, not on the day mentioned in the notice, but on another and different day* ; and this will nonsuit the Plaintiff. This is done either by showing the

(q) *Keech v. Hall*, Dougl. 21.

(r) 1 Esp. Dig. 462. and N. P.

actual time when Defendant became Tenant by a witness, or by some agreement in writing, an expired Lease or otherwise.

2. He may show the *true time of serving the notice to quit*, and that it was *short of six months*; or that it never came to his hands: as if Plaintiff proved the service of the notice on some Person on the Premises, but who, on being called, proved that he had never delivered it to the Tenant.^(s) This must be proved by parol.

But where it is said that a notice to quit is insufficient if short of six months, that is, the case where the Tenancy is a *yearly one*: for if the taking of the Premises was by the month or week, a month or week's notice would be sufficient. So if there is an agreement that the Tenant shall accept any shorter notice, on proof of the agreement, and the corresponding short notice, that will be sufficient. And where the Tenant agrees to take a shorter notice than six months; still that must end with the year, unless otherwise expressed; with which the notice to quit must correspond.

3. He may show a waiver of it by the Landlord.^(t)

This may be done, either by proving receipt of Rent by the Landlord as Rent, or a Distress made by him for Rent becoming due after the notice to quit expired, or by his bringing an Action of Covenant for it; for by receiv-

^(s) Jones v. Marsh, 4 Term Rep. 464.

^(t) 1 Esp. Dig. N. P. 472. Cowp. 243. 6 Term Rep. 219. Bull. N. P. 96.

ing the Rent, or making a Distress for Rent, so subsequently due, the Landlord admits the Defendant to be his Tenant at that time; for did he rely on the notice, the Tenant would have been a Trespasser.

To give the Defendant, however, the effect of these acts as amounting to a waiver—if it is receipt of Rent he relies on,^(u) he must show that the Plaintiff received the money *as Rent*; that will best appear by the receipt: if the Landlord had *distreined*, the Defendant should show the notice of Distress served on him, which specifies for what it was made; or if there was a *Replevin*, he should show by the Avowry, the Landlord claimed by it Rent subsequent to the notice: for which purpose the proceedings in Replevin or an examined copy must be given in Evidence. If it was on the ground of an *Action of Covenant*, the Declaration in Covenant should be either produced, or an examined copy of it.

But in addition to this Evidence, in order to make any of these cases amount to a waiver of the forfeiture, the Tenant must prove that *at the time the Landlord knew of a forfeiture being committed*;^(v) such as if he lived near the demised Premises, and saw the Defendant commit the breach of Covenant on which he goes; as ploughing up old meadow, *e. g.* and afterwards accepted Rent: that would waive the forfeiture. But the Defendant must give these facts in Evidence by a witness.

But it must be observed, that where the breach of Co-

(u) 1 Esp. Dig. N. P. 478. Pennant's Case, 3 Co. 64.

(v) Cowp. 803.

tenant is a continuing one, as suffering the Premises to be out of repair ;(x) the acceptance of Rent, or distraining, is only a waiver of the then existing breach of Covenant ; and that if the Tenant continues to suffer the Premises to continue unrepaired, an Ejectment may be brought for such continuing breaches : these matters must be, therefore, well attended to in settling the Evidence on them. It is, therefore, always prudent for the Plaintiff to be prepared with proof of an existing breach of Covenant as near to the time of bringing the Ejectment as possible.

Of the Evidence on the part of the Lessor of the Plaintiff, as Assignee of a Bankrupt, Mortgagee, Lord, or Copyholder, under an Elegit, by Devisee, or Heir at Law.

1. If an Ejectment is brought by the *Assignees of a Bankrupt*,(y) in addition to the proof of the Commission, and that they are Assignees as before stated : they must show that the *Deed of Assignment* from the Commissioners to them *was enrolled*. This will appear by the indorsement of the proper Officer on the Deed, and is so proved.(z)

This is necessary to complete their title ; but as the Assignment of the Commissioners only operates on lands which were the Bankrupt's at the time of the assignment ; the Defendant may show that the lands for which the Ejectment was brought came to him afterwards, and non-

(x) *Doe v. Bliss*, 4 Taunt. 735.

(y) 1 Esp. Dig. N. P. 439. Cas. K. B. or 12 Mod. 3.

(z) Per *Buller* Dougl. 56.

suit the Plaintiff; as, in that case, there should be a new Deed of assignment and enrollment of it.(a)

2. If the Ejectment is brought by a Mortgagee.

This Ejectment can only be maintained against the Mortgagor himself who is in possession of the mortgaged Premises, or against a Tenant who has come into possession of them under him subsequent to the Mortgage. In that case the Plaintiff is only called upon to prove the execution of the mortgage Deed, and the possession as stated; then by reference to the Deed when proved, it will appear that the time for payment of the money is elapsed; and, of course, the right of entry is complete.

If the Defendant was a Tenant to the Mortgagor prior to the Mortgage, he must show that he was so, either by proving his Lease, or showing a demise to him so made and still existing; and that will nonsuit the Plaintiff.

3. If the Plaintiff's Ejectment is to obtain possession of Premises under an *Elegit*, he must give in Evidence an examined copy of the Judgment Roll which he obtained, and under which the *Elegit* issued, and which contains the award of the *Elegit*, and the Return of the Inquisition; but he need not produce a copy of the Writ of the Inquisition, and the Sheriff's return on it.(b) That Roll sets out the Inquisition held by him, and the finding of the Jury of the Premises for which the Ejectment is brought.

As the Return to the Inquisition contains the finding of

(a) *Doe v. Mitchell*, 2 Mau. & Selw. 446.

(b) 2 Mau. & Selw. 565.

the Jury of the Premises for which the Ejectment is brought, it must be attended to, that it is accurate in describing and finding the Premises by metes and bounds ; or the objection may be taken at the Trial, and the Plaintiff cannot recover.(c)

4. If the Ejectment is for *Copyhold lands*, it may be by the Lord for a forfeiture, or by the Tenant to recover land so seized by him, by a person claiming as Heir ; or as entitled by purchase.

If the Ejectment is by *the Lord for a forfeiture*, he must,—1. Show that the Defendant was a Copyholder of the Manor, of which he is the Lord : that will appear by his admission on the Rolls.(d)—2. He must prove a custom of the Manor for the Lord to seize for a forfeiture by reason of the act done by the Tenant ; as by cutting Timber, for example ; and then show that the Tenant committed that act.(e) The custom is generally proved by the Steward, or some ancient Persons who have long known the Manor, and that know the custom. The act of the Defendant is matter of parol Evidence. He should also show, that he was Lord when the forfeiture took place, and that the act was done within twenty years.

If the Lord has seized the Land as forfeited, and the Copyholder who has been evicted, or who claims to be entitled, brings the Ejectment ; the Plaintiff in such case must prove, if *He* was evicted, his own admission by the Rolls of the Court ; if he claims as Heir, Devisee, or

(c) 1 Barn. & Ald. 40. (d) *Roe v. Hillier*, 3 Term Rep. 162.

(e) 1 Esp. Dig. N. P. 448.

Purchaser, under the Tenant who was last seized of the Copyhold, his title is established by proving the admission of the Person under whom he claims, by the Court Rolls, and then establishing his title; if as Heir at law, by showing his pedigree: if as Devisee, by proving the Testator's Will: and if by Purchase, by proving the conveyances from such Person to him. When that is done, the Defendant is called upon to show his title which is under the forfeiture.

But where the Ejectment is for a Copyhold, and the Person who claims title(a) has never been admitted, he must give in Evidence, an application to the Steward of the Court to be admitted, and a refusal on his part, for an actual admission is not necessary; a proceeding which in fact should be taken in the case of every Ejectment brought for Copyhold premises: this must be done by some Witness who accompanied the Lessor of the Plaintiff for the purpose of demanding admission, or by proving a written answer to such an application, from the Steward or Lord.

By Statute 55 Geo. III. ch. 192. a Devise of a Copyhold Estate by Will, is enacted to be effectual and good without a previous surrender to the use of it; so that the production of the Court Rolls, to show a previous surrender to the use of the Will, is now no longer a necessary part of the Evidence in an Ejectment for Copyhold Premises: proof of the Will is sufficient for that purpose.

(a) *Doc v. Bellamy*, 2 Mau. & Selw. 87.

5. If the Ejectment is brought by the *Devisee* of an Estate in Fee, the Plaintiff is required to give strict proof of the Execution of the Will under which he claims, as the Defendant generally is the heir-at-law, or a purchaser.

For that purpose the Plaintiff must prove the death of the Testator, and that he was in possession of the Estate at the time of his death. He must then produce the original Will of the deceased. If there was no personal Estate given by it, so that it was not necessary to have any Probate of it, the Devisee must produce it; if it was brought into the Commons, by reason of some personal property passing by it, an Officer from thence must produce the original Will, and state from whence he brought it.

The Execution of it by the Testator is then required to be clearly proved, *(b)* according to the Statute of Frauds, which requires the attestation of three Witnesses; and this must be done by one at least of the Subscribing Witnesses, who must be called to prove, that the Testator executed the Will in his presence, or acknowledged that he had signed it, and that of the two other Witnesses who attested and subscribed it as such, in the Testator's presence, when the attestation so expresses it. But if there are three Witnesses to it, the Subscribing Witness need not see the act of signing by the Testator: *(c)* it will be sufficient if he acknowledged to them together, or each of them separately, that the Will was his, and the signature his hand-writing; and the Subscribing Witnesses must

(b) Phillips on Evidence, 434.

(c) *Id.* 437.

subscribe their names in the Testator's presence, but it need not be so expressed in the attestation.

In practice it is usual to call one Witness only to prove the Execution of it by the Testator, and the attestation of it by the other Witnesses ; but that can be the case only when they were all present together. If the Witnesses attested the Will at different times, they must be all called to prove the Execution of the Will by the Testator in the presence of each, and their attestation of it in his presence ;(d) for the Will must be regularly executed in the presence of three Witnesses. If the sanity of the Testator is disputed, or the regular Execution of the Will, it will always be prudent for the Plaintiff to call all the witnesses to it.

If any of the Subscribing Witnesses is abroad, it will be sufficient to prove his hand-writing ;(e) and when they are all dead, it will be sufficient to prove the Testator's hand-writing : but a Will thirty years old proves itself, as in the case of a Deed ; it therefore need only be produced.

This is the case of a Devise of Estates of Inheritance : (f) but if the Property, sought to be recovered, is Copyhold or Leasehold only ; as the Copyhold by Stat. 55 Geo. III. requires no surrender, and it and Leasehold pass by a Will requiring no formal attestation, the Plaintiff should prove that the Testator was entitled to it ; in the case of Copyhold, by showing his admission and en-

(d) Phillips on Evidence, 439.

(e) 2 Stra. 1109.

(f) 1 Esp. Dig. N. P. 481.

joyment of it; and in the case of Leasehold, by producing either the Lease under which he held it, or showing his title to it. The Plaintiff should then produce the Probate of the Will, by which the Testator gave it to him; and then, in the case of Leasehold, prove the assent of the Executor or Administrator to the bequest. To prove this last fact the Executor himself, or Administrator, may be a witness, or some Person who knows of the assent being given; so proof of the Executor permitting the rent to be received by or for the use of the Legatee, will be sufficient proof of it.

Of the Evidence by the Defendant in the case of an Ejectment by a Devisee.

1. The Defendant may prove that the *Testator*, at the time of making his will, (g) was *not sane*. This is matter of fact to be proved by Witnesses, who knew him.

2. That he was an *Infant*. If the Ejectment is for Lands, or Estates of Inheritance, he must, in that case, prove the Testator to be under the age of twenty-one years by Evidence of the time of his birth, as is before mentioned in cases of Infants, before which time he cannot devise such Estates.

But if the Ejectment is for Copyhold Lands, the Plaintiff may show, that by custom, an Infant of a certain age may devise by will; and if it is for Leasehold; a male may devise such property at the age of 14 years, and a

(g) 1 Esp. Dig. N. P. 487.

female at 12. The age of the Testator being proved as before stated, is therefore Evidence of title.

3. He may prove that *Testatrix* was, at the time, a *Feme Covert*. For she cannot make a Will, unless a power to do so has been reserved in her settlement when married. Her marriage must be proved as is before stated; but may be rebutted, by proof of the Settlement before marriage, by which a power was reserved to her to make a Will: this must be done by producing and proving the Deed by the attesting Witness.

4. He may show that the *Will was obtained by fraud*, circumvention, or availing himself of the Testator's imbecility of mind or body. This is matter of fact to be proved by *viva voce* Evidence of Persons who were with the Testator before or at the time of his death, or knew of his habits before it.

5. He may prove the *Will* set up by the Devisee to have been *cancelled or revoked*; this is by something done in fact, or by operation of law. This last can only be effectual under the Statute of Frauds, by showing another Will or Codicil in writing, or other Writing, declaring it to be cancelled or revoked; (h) and which must be duly executed as the original Will was, or by the first Will being torn, burnt, or cancelled by the Testator himself, or by some one in his presence, and by his direction.

When this is to be set up in answer to the Will on which the Devisee relies, Defendant must produce an-

(h) Esp. Dig. 490.

other Will or Codicil of later date than that given in Evidence by the Devisee; and he must prove the Execution of it with the same solemnities as the other was proved with.(i) If the Defendant relies on the burning or tearing of the first Will, that will appear by the Will itself when produced, but it may be proved on the other side, that it was done by accident; otherwise, either the burning or tearing of it is good proof of cancellation.

But there is this difference between the setting up a second Will as a revocation of the first,(k) and the tearing or burning of it, in this respect, that though the second Will will operate as a revocation of the first, where both exist together; yet, if the Testator cancelled the second Will, and the first remained undestroyed, the latter is thereby set up:(l) but if the first Will was cancelled, as by tearing off the seal and hand, or burning the copy, it will not be set up by cancelling the second will: these are matters of fact to be proved by Witnesses.

6. The Defendant may set up, in answer to a Will,(m) the *revocation of it by operation of law*. These are, 1. *Marriage and the birth of a child* taking place subsequent to the making of the Will. For this purpose the Defendant must prove the actual marriage of the Testator as before-mentioned, (page 99.) and prove the birth of a child or children. 2. *By producing and proving a fine levied of the lands in dispute*, or a recovery suffered, or any Deed of Conveyance or Settlement of them, made subsequent to the Will, or what amounts to a change of

(i) 1 P. Wm. 343.

(k) Esp. Dig. 491. 4 Burr. 2512.

(l) Cowp. 49.

(m) 1 Esp. Dig. N. P. 492.

the Estate. In such case the Officer's exemplification and a copy of the Fine or Recovery should be produced, and the Execution of the Deed declaring the uses be duly proved.

7. The Defendant may show the Will to be inoperative on the ground, that the *Testator became entitled to the Estate in question, by descent or purchase, subsequent to the making of the Will* for such lands which pass by it. This is done by showing the Conveyances under which the Testator took, and their dates of Execution.

5. Of the Evidence in an Ejectment brought by a person claiming as *Heir-at-law*.

In this case the Plaintiff must make out his case by strict Evidence of Pedigree, in an unbroken line of descent. If he claims to be son of the Person last seized, he must prove not only that he was so, but was his legitimate son.

The best Evidence of this, is proof of the actual marriage of his Father and Mother, by Witnesses, who were present at the time ; the copy of the marriage registry, and cohabitation.

This is done by producing an examined copy of the Register from the Church Books, and the *vivâ voce* testimony of Witnesses who know the parties.

When such full and precise Evidence cannot be had, their cohabitation : the introduction of the Plaintiff's

Mother by his Father as his Wife : her reception as such in Society : his declarations that they were married : is all good Evidence, and may be proved by Persons acquainted with the Family.

The Plaintiff should also prove, that his Father either had no other Son, or that he was the eldest, if he had : and if the Ejectment is by a woman, who claims as Heir, she should prove, that her Father had no Son.

For this purpose, entries by the parents, in the Family Bible, of the birth of their children, have been held good Evidence. Entries in the Books of the Parish where the Father and Mother resided, of their baptism, are good Evidence, and are proved by copies examined with the original. They express the time of the birth of their children, and of course ascertain which is the eldest : but as it often happens that the Father and Mother may have had many children baptized in the same Parish ; and the Plaintiff may appear by the Registry not to be the eldest, though the others are dead ; it will then be necessary for him to prove their deaths ; and if any born before him appear to have been married, he should prove either that they had no issue, or that if they had, that they are dead, as the children of an elder brother have title before him : for this purpose examined copies of the Registers of burials are good Evidence.

These facts are, however, capable of proof by Witnesses who knew the Family, who can speak to the relationship in which the Plaintiff stood to the Person he claims under, and who may know of the deaths of those who are before the Plaintiffs in point of title. But though

this Evidence is sufficient, it is always advisable to have the Copies of the Registers, as they are without suspicion.

In settling Evidence of Pedigree, it must be observed as a Rule, that a Party has not made out his title sufficiently, if by possibility there may be existing some lineal, or collateral, Relation having better title than he has.

But that there is such, is not to be *supposed* without some ground : as if a Party proves himself to be the son of John and Mary, it is not to be presumed that they had a Son elder than the Plaintiff ; but, if an entry is found, or produced on the other side, or parol Evidence given that they had a Son elder than the Plaintiff, it will be presumed that he is living, unless the Plaintiff shows the contrary ; and such Son having better title, the Plaintiff cannot recover.

The Rules here laid down apply to cases of collateral kindred : if the Plaintiff claims, for example, as the nephew of the Person last seized, he must show that he is heir to the eldest brother of such Person ; or if he derives title as Nephew by the mother's side, that such Person had no brother.

This is sufficient for the Plaintiff, as a *prima facie* case ; and then the Defendant may impeach it.

If a Devisee, or any other Person, gets into possession, and an Ejectment is brought by the Plaintiff claiming as Heir-at-law to him last seized, either against a Person

who claims in the same right, or a Devisee in possession ; the Defendant may set up the defence of *Bastardy in the Lessor of the Plaintiff*.

This is a question of fact to be proved by witnesses only, in most cases.(n) They are most usual where a marriage had in fact taken place between the Plaintiff's mother, and the Person whom he sets up as his father ; but the Defendant can prove that the Plaintiff was born before the marriage took place : while the Plaintiff's Father was absent from England : or in a distant part of the kingdom, where the Plaintiff was born, and had been so for more than nine months preceding.(o) So that there could be no presumption of access.

2. That though a marriage had taken place, it was void under the Marriage act, 26 Geo. III. c. 33.(p) as being by an Infant without the consent of his Father ; or if he is dead, of the Guardian : or of the Mother, if there is no Guardian, if living and unmarried ; and if there is no Mother living and unmarried, of a Guardian appointed by the Court of Chancery : so by the same Statute he may show that the marriage, though celebrated in a church or chapel, was without publication of Banns or Licence.

3. He may prove that the Plaintiff's father was impotent, and so he of course a Bastard.(q)

4. He may prove a sentence of Divorce dissolving the

(n) 1 Esp. Dig. N. P. 495.

(n) Vid. Dig. 497.

(o) Bull. N. P. 112.

(q) 2 Str. 940.

marriage which is done by a Copy of the Proceedings in the Spiritual Court, which, while unrepealed, is conclusive.(r)

5. He may show, that the Plaintiff was born more than nine months after his father's death.(s)

It will, after consideration of these general heads, be proper to consider the Evidence in Ejectment where a Fine or Recovery has taken place, as the operation of them may occur in all the preceding cases.(t)

If a *Fine* has been levied of the lands, for which an Ejectment is brought, the Lessor of the Plaintiff should, prior to his bringing the Ejectment, make an actual entry, on the lands, or cause one to be made in his name, and claim the possession. Of this entry Evidence must be given at the Trial: and though it is not required to be done, unless there has been Fine with Proclamations, it is always advisable.(u)

A Fine, or Recovery, is generally set up by the Defendant in bar of the Plaintiff's right; and when valid is conclusive, unless the party comes within some of the exceptions which afford to the Plaintiff an answer to the effect of the Fine or Recovery.

The Evidence necessary in the case of a Fine is given :
—1. By the production of Chirograph of the Fine. This is made out by Chirographer of the Court of Common

(r) Carth. 225.

(s) Bull. N. P. 414.

(t) Esp. Dig. 459. 4 H. 7. ch. 20. (u) 9 East. 19.

Pleas, (x) and is Evidence of itself : but if it is a Fine with Proclamations, it is not sufficient proof of the Proclamations that they are indorsed on the Chirograph : (y) they must be proved by a Witness who examined them with the Roll, and be thereby proved to have taken place.

—2. In addition to the Fine it is necessary to have Evidence at the Trial to show, that the Person, by whom the Fine was levied, was in possession of the land when he did so levy it ; (z) for otherwise the Fine will be of no avail : but proof of payment of rent to the Cognizor will be sufficient : so there may be other Evidence ; such as proof of actual occupation or enjoyment.

If a recovery is set up, it is given in Evidence by production of an examined copy of it.

If the Recovery was suffered by a Tenant in Tail, that is sufficient : but if, at the time of the Recovery suffered, there was a Tenant for life, in which case a surrender of his Estate is necessary to give validity to the Recovery, that surrender in case of a modern Recovery, must be proved to have taken place. (a)

But after twenty years' possession under a Recovery, (b) the title of a Purchaser is declared to be valid, on proof of the Deed making a Tenant to the Præcipe, and declaring the uses.

6. The question often arises in trial of Ejectments,

(x) Gilb. Ev. 21. (y) Bull. N. P. 230. 3 Taunt. 166.

(z) 11 East. 495. Cowp. 621. (a) Stra. 1119. 2 Burr. 1065.

(b) Vid. *Plea. Stat.* 14 Geo. 2. c. 20.

as to whether lands were parcel or not parcel, or of one parish or another.

In these an old Terrier of a Manor, ecclesiastical, or temporal, may be given in Evidence.(c)

7. If the Ejectment is by one Tenant in Common against another, to recover his part of the Premises,(d) the Plaintiff must show that the Defendant claims the whole Estate, and refuses to admit him to any part, which will be sufficient : (e) but it will not be sufficient to show that the Defendant took all the profits ; the Plaintiff should, therefore, always be prepared with proof of his demand, of his part, made on the other Tenant in common.

8. If an Ejectment is brought for Tithes, or for a Rectory.

The Lessor of the Plaintiff must prove that he was admitted, instituted, and inducted into the Rectory,(f) had read and subscribed the thirty-nine articles, and declared his assent and consent to every thing contained in the Book of Common Prayer.

Institution alone is not sufficient; and in fact it is right, in every case, to prove presentation by the Patron to the Rectory.(g)

(c) Bull. N. P. 248.

(d) 1 Esp. Dig. N. P. 442.

(e) 11 East. 95.

(f) 1 Sid. 220.

(g) 1 Vent. 14. 1 Sid. 423.

The Letters of Presentation are addressed to the Bishop of the Diocese, and are there to be found.

The admission, induction, and taking possession of the Living; as that is done in the Church, the facts above required are proved either by the Clerk of the Parish, some of the Parishoners, or any Clergyman who might have been assistant at the ceremony.

But the mere fact of taking the Tithes is clearly not sufficient :(*h*) and an entry on the Glebe should be proved.

It is always necessary, at the Trial of an Ejectment, to be prepared with proof that the Defendant was in possession of the Premises for which the action is brought. This may be done by proof of actual enjoyment; or, if let, by calling the Tenant who paid rent to the Defendant.

(*h*) Latch. 62.

CHAPTER X.

OF SETTLING EVIDENCE IN THE ACTION OF SLANDER.

1. **THE** Plaintiff in this Action, *if for words*, is bound to prove the words laid in his Declaration. This must be by some witness who heard the Defendant speak them; and if they are of ambiguous meaning, he must also prove that he understood them in the slanderous meaning imputed to them.(a)

2. If the Action is for a *Libel*, or written Slander, the Plaintiff must produce the Letter, or Publication, in which the Slander is contained; but if it is a Letter, or Pamphlet, he must prove the publication; that is, that the Letter, or Pamphlet, was sent to be copied by, or shown to, or read by, a third Person. A Newspaper, from its nature, implies publication.

But though the Plaintiff must prove the words, he is not bound to prove them precisely, or in the very terms they are laid in the Declaration;(b) it is sufficient to prove that

(a) 2 Esp. Dig. N. P. 23.

(b) Bull. N. P. 5.

they are substantially the same in point of sense and manner of speaking.

Therefore, if the words are laid in one Person, and proved to be spoken of in another, as if laid, "He is a Thief," and these proved are "You are a Thief," that Evidence will not support the Declaration; for the words are substantially different spoken of, or to, a Person. (c)

So if the words are laid positively; as "A. B. cannot pay his labourers," and the Evidence is, that they were spoken interrogatively, "Have you heard that A. B. cannot pay his labourers?" that will not support the Declaration, for their import is different; in one sense they assert matters as a fact; in the other, they only allude to a report.

3. Where words are spoken, or a Libel written, of a Person in any Profession, Business, or Situation, and which are actionable only as alluding to such Profession, Business, or Situation; that the Plaintiff is a Member, or belongs to them, must be proved, as laid in the Declaration.

As if a Physician was to bring an Action for calling him a Quack, he would be bound to prove a Diploma from the College of Physicians allowing him to practise, or a regular degree of Doctor of Physic from some of the Universities; but, in that case, the Seal of the University

or College granting the Degree or Diploma ought to be proved.(d)

But, in the case of an Attorney, it is sufficient to prove his having conducted suits, and practised as such.(e)

4. Where words are actionable only as spoken of a Person in a particular character or situation or alluding to any particular transaction ; as, for example, if there was a conversation or *colloquium* respecting the circumstances of any Person; which, under particular circumstances, may be actionable or not; the *colloquium* must be proved as introductory of the Slander. This must be done by a witness who was present and heard it.(f)

5. The Plaintiff cannot go into Evidence of any special damage arising from the Slander, unless he has laid it in his Declaration; and then he is confined to that only;(g) as, for example, if the Plaintiff laid his special damage to be the loss of the custom of T. S., which in the language of the Declaration is, "whereby he lost the custom of T. S. and of *divers* other good and worthy subjects," the Evidence would be confined to the damage from the loss of the custom of T. S. only, and the Plaintiff could not give Evidence of the loss of any other.(h)

6. Where words are actionable by reason of some special damage arising from them, but are not so of them-

(d) 8 Term Rep. 308.

(e) 4 Term Rep. 366. 2 Esp. Dig. N. P. 21.

(f) 2 Esp. Dig. N. P. 24.

(g) 2 Ld. Raym. 1007. 1 Stra. 665.

(h) 2 Esp. Dig. N. P. 23. 1 Stra. 666.

selves ; as to say of an unmarried woman, " She had a Bastard," which words are not of themselves actionable ; but if the Declaration went on to state " by which T. S. who would have married her, refused to do so," the Plaintiff must prove the very special damage laid, or he will be non-suited ; for it is that damage only which will sustain the Action ; and, according to the preceding Rule, the Plaintiff must prove that T. S. refused to marry her, and cannot be admitted to prove that any other Person refused to marry her.(i)

7. Though the Declaration lays the speaking of the words on a particular day, the Plaintiff may give Evidence of the same words, or of the same import, spoken by the Defendant at other times : but he cannot give Evidence of other actionable words spoken by him at other times.(k) So, in the case of a Libel, the Plaintiff cannot give Evidence of other Libels published of him by the Defendant, unless they refer to the Libel stated in the Declaration, in which case he may.

8. As the most general case of Libel is for publication in the Newspaper, the Evidence to fix the Publisher or Printer is regulated by Stat. 38 Geo. III. ch. 71. *quod vide.*(l)

9. Where the initials of the name only are used, or there is any doubt of the meaning of the words, the Plaintiff must call witnesses to prove that he was the Person designated, or that the words used applied to him, and that the witnesses so understood them.

(i) 2 Ld. Raym. 1007.

(k) 2 Campb. 72.

(l) 2 Esp. Dig. 25.

Of the Evidence by the Defendant.

1. The Defendant may give in Evidence, that the words, which he spoke, or wrote in the imputed Libel, are true : but this is only admissible in Evidence, where the Defendant has pleaded that they are so.

2. The General Issue in Slander is, *Not Guilty*. This puts the Plaintiff on proof of the words laid : but, as far as respects the Defendant, it is not a mere denial that he spoke the words, but that he spoke them not slanderously : for though the words spoken may be actionable as written or spoken, the Defendant may give Evidence that they were not spoken in the actionable and slanderous sense imputed to them, but with a different import. This is done by the Defendant calling witnesses to speak to the subject of the conversation when they were spoken, or the manner in which they were applied ; as if the conversation was respecting the Plaintiff's having killed Game, and the Defendant was to say, " He is a murderer," meaning to apply that term to the quantity the Plaintiff had killed, the words would in that case not be actionable.

3. So he may prove, that he used the words as Counsel in a cause, applicable to the case, (*m*) or that he spoke or wrote them in confidence ; as if on inquiry of the Defendant as to the solvency of a Person in trade, or of the character of a Servant, he was to say, that he thought the former in very doubtful circumstances, or the latter a servant addicted to dishonesty or drunkenness, meaning to give a fair and honest caution to the Person inquiring :

(*m*) Cro. Jac. 91.

Evidence that the words were so spoken or written would render the words not actionable. These facts are proved by witnesses, who are allowed in such cases, (though not generally) to speak from opinion, as to what object and with what intention they were spoken.

4. In case of Libel, the Defendant under the General Issue may give in Evidence, in mitigation of damages, that the Plaintiff was, before the publication, suspected of being guilty of the crimes imputed to him in it. But this is only allowable where the General Issue is pleaded.⁽ⁿ⁾

(n) 2 Esp. Dig. 28. 2 Campb. 277. 2 Mau. & Selw. 284.

CHAPTER XI.

OF SETTLING THE EVIDENCE IN THE ACTION FOR MALICIOUS PROSECUTION.

THE settling of Evidence for the Plaintiff in this case is best done, by attending to a few general rules applicable to all cases.

1. It is laid down as a general rule in this Action, that to entitle the Plaintiff to recover in it, he must show the Proceedings instituted against him by Defendant, and prove that they were groundless ; that is, were instituted without any probable cause, and proceeded from malice ; and the Plaintiff must establish both by Evidence.

The Plaintiff, therefore, in this Action, must first give in Evidence the Proceedings themselves which the Defendant issued against him ; as if the Plaintiff declares that the Defendant procured him to be taken into custody under a Warrant granted by a Justice of Peace on his information, the information must be produced : this is done by subpœnaing the Justice of Peace, or his Clerk, with a *duces tecum* of the original information, and proof by them that it was made and sworn to by the Defendant ; and then the Warrant granted on it, which is either in the hands of the Constable or Justice, must be produced. The arrest and detention of the Plaintiff under it

must be next given in Evidence, and the discharge by the Justice.(a)

2. If the Prosecution was by Indictment, the Plaintiff must give in Evidence a copy of the Indictment and Acquittal, examined with the original, either in the King's Bench or Quarter Sessions ; or the original Proceedings may be produced by the Officer of the Court where the Indictment was preferred. But if the Indictment was for Felony, as no Action will lie in that case if the Defendant has been acquitted, unless the Court grant a copy of the Record and Acquittal, Evidence must be given to that effect, and the leave be proved : (b) in which case there should be an order from the Attorney General to the Officer of the Court, to produce the Record of Acquittal and the order of the Court. The copy of the Indictment, if produced, must be proved by a witness who examined it with the original, and then Evidence be given of the Trial and Acquittal of the Defendant, if the Record is not sufficient ; which it should seem to be.

3. If the Action is for a malicious arrest, either where there was nothing due by Plaintiff to Defendant, or the arrest was for a much larger sum than was really due, if the Plaintiff states that he was held to Bail for a certain sum, by virtue of an Affidavit made by the Defendant, he must produce an examined copy of the Affidavit made by the Defendant to hold him to Bail, or the original Affidavit, and prove the hand-writing of Defendant subscribed to it.(c) But as that averment is now usually omitted,

(a) 2 Esp. Dig. N. P. 29.

(b) 14 East. 302.

(c) Per *Buller*, J. 2 Esp. Dig. N. P. 38. Bull. N. P. 14.

and the arrest stated generally, the Writ, with an Indorsement on it, to hold to Bail for the sum mentioned, must be produced, and it will be sufficient Evidence. The Plaintiff must then prove an actual arrest at the Defendant's Suit, which is done by the Officer of the Sheriff to whom the Writ was directed; he must then prove that the Suit, in which he was so arrested, was terminated, either by a Judgment of *non pros*, or verdict, or discontinuance; so that it should appear that the Plaintiff had no cause of Action. (d)

4. In all the cases now put, the Plaintiff must prove that the Proceedings were groundless, and that known to the Defendant; (e) as, *ex. gr.* if he had been taken on a charge made before a Justice of Peace: he may prove that he was not present when the imputed offence was committed, or was in another place, so that he would not be guilty, and that the Defendant knew it: in like manner, if indicted, he may give similar Evidence; and if he was arrested for more than was due, he may show a settlement of accounts before the arrest made, between him and Defendant, and a small balance then struck as only due, notwithstanding which, Defendant had arrested him for a large sum.

These are cases where there have been Proceedings by the Defendant without any probable cause; in which case malice will be inferred: but the Plaintiff, when not in possession of such Evidence, may give Evidence of actual malice; such as declarations made by him that he would

(d) 2 Esp. Dig. N. P. 38. 1 B. & P. 281.

(e) 2 Esp. Dig. N. P. 30.

ruin the Plaintiff. And Evidence of actual malice being admissible to any extent, it is always adviseable to have it ;(*f*) such as advertisements put into the Newspaper, mentioning, *e. g.* without any apparent reason for it, that a true Bill of Indictment was found against the Plaintiff.

These matters of Evidence it is impossible to specify ; and the others depend on the averments in the Declaration : such as being put to great expense : the Plaintiff should be, therefore, prepared with proof of the amount.

5. But, in every case, the Plaintiff must prove the Proceedings, which the Defendant instituted against him, to be at an end.(*g*) As in the case first put, he must show that the Justice dismissed the complaint ; in the second, his Acquittal ; and, in the third, that the Suit commenced by the arrest is at end, either by a verdict, *non pros*, or discontinuance, in which case of a verdict or *non pros*, he must have an examined copy of the Judgment Roll ; in the second, he must produce the Rule. And all these proceedings must be proved by written Evidence, and cannot be dispensed with.(*h*)

6. In preparing and settling the Evidence for Trial in this Action, the greatest attention must be observed in comparing the written Evidence with the Declaration, and examining the parol by the averments to be proved, as any variance in that respect is fatal.

Thus, if the Declaration states that the Plaintiff had

(*f*) 1 Stra. 691.

(*g*) 2 Esp. Dig. N. P. 31. Bull. N. P. 13. Salk. 12. Dougl. 205.

(*h*) 2 Esp. N. P. C. 27. MSS. Cas.

been maliciously arrested, and held to Bail on a Writ returnable in *Easter Term*, and the Writ when produced appeared to be of *Trinity*. If the Declaration states, that the Plaintiff had been maliciously taken into custody under a Warrant for Felony, and the Warrant when produced was for a Misdemeanor, or on suspicion, the Evidence would vary from the Declaration, and the Plaintiff would be non-suited. (i)

7. The objects of special damage are matters stated in the Declaration, and vary with the case. Thus, in the case of a malicious arrest, if the Plaintiff averred that he was in trade, and in consequence of it having got abroad that he had been arrested, that other Creditors had arrested him, who would not have done so but on account of their belief that his credit was bad, concluding it to be so by reason of his arrest, the Persons who so arrested him must be called as witnesses to prove not the arrest of the Plaintiff only, but their motives for doing so. But in every case the Plaintiff must have been put to certain expenses; these are always laid in the Declaration, and are proved at the Trial by witnesses.

Of the Evidence for the Plaintiff in an Action for a Conspiracy.

This Action, as to its object, differs nothing from the Action for malicious Prosecution, except that more persons than one are implicated in it; and the same Evidence is required. If the Action is for a Conspiracy, two at

(i) 2 Esp. Dig. N. P. 35. 4 Term Rep. 590.

least must be found Guilty ; but if the Action is Case in the nature of a Conspiracy, a verdict may pass against one only.(k)

2. *Of the Evidence for the Defendant.*(l)

The General Issue in this Action is Not Guilty ; and under it the Defendant may go into any Evidence to justify the proceedings for which the Action has been brought against him. He may show a probable cause, which in all cases is sufficient. As if the Action be for suing out a Warrant, and taking Plaintiff into custody for a Felony, Defendant may give in Evidence a Felony committed ; that the Defendant was seen near the place at the time, under suspicious circumstances : this is matter of parol Evidence. In fact, the Defendant may give every thing in Evidence which tends to his exculpation, and disproves malice ; and proof is not required beyond fair presumption. Therefore, the Jury finding a true Bill against the Plaintiff, though he was afterwards acquitted, was held to be proof of a probable cause.(m)

(k) 2 Wils. 200.

(l) 2 Esp. N. P. C. 38.

(m) 2 Esp. Dig. N. P. 40.

CHAPTER XII.

OF THE EVIDENCE FOR THE PLAINTIFF IN THE ACTION
OF TROVER.

THE leading points of Evidence indispensable to be proved by the Plaintiff in the Action of Trover are,—
1. A property in himself in the things for which the Action is brought.—And, 2. That the Defendant converted them to his own use, or refused to deliver them to the Plaintiff after demand. An absolute property in the Goods is not indispensable; a special property will enable the Person having it, to maintain the Action against a stranger.

In this Action more questions of property are tried than in any other, in cases where Parties became possessed of property under particular circumstances: such as by sale without delivery; by sale and imperfect delivery where the Goods are *in transitu*; by sale of a Factor or Agent; by sale of the Sheriff; by pledging, &c. (a)

In settling the Evidence for the Plaintiff, each of these cases must be attended to.

(a) 2 Esp. Dig. N. P. 38. 1 Selk. 15.

1. *In the Case of a Sale without Delivery.*

If a man sell goods to another who pays for them, and he afterwards refuses to deliver them upon demand : upon giving Evidence,—1. Of the sale and price.—2. Proving that he paid for them ; and, lastly, a demand from the Defendant to have them delivered to him ; he will be entitled to a verdict for their value at *Nisi Prius*.

And a sale by a Factor or Agent, who is authorised to sell, equally binds the Principal, and subjects him to an Action in the same way ; but the Factor or Agent should be called to prove his authority for the sale on the Defendant's account.

The Evidence which the Defendant may give in reply in these cases, is such as shews, that there was fraud in the purchase, or good ground for rescinding the contract. Such as the purchaser having stopped payment before the Goods reached him, having given bad Bills which had been refused acceptance. This is called a stopping of the Goods *in transitu*. (b) In this case, the Defendant is bound to prove the grounds of his stopping his Goods before delivery. Such as a Docket having been struck against the Plaintiff, the Buyer, or against the Persons whose names are on the Bill given in payment for them ; that he or they were uncertificated Bankrupts, or the like.

2. If the Goods have been sent to a Factor to be sold, and he in place of selling has *pledged* them, (c) the Owner may recover them at once from the person who has got

(b) 2 Esp. Dig. N. P. 40.

(c) 2 Esp. Dig. N. P. 41.

them ; for such a pledge does not change the property ; and, to prove the transaction, the Plaintiff may call as witnesses either the Factor himself, or the person with whom he pledged them. (*d*)

3. If a man buys Goods which have been *stolen*, the Owner may recover them back in this Action from the Buyer, provided he has prosecuted the Felon to conviction. (*e*)

Where Trover is brought to recover Goods under such circumstances, the Plaintiff must prove,—1. That the Goods were his, and were stolen from him.—2. He must produce an examined copy of the Record of the conviction of the Felon for stealing the Goods claimed: (*f*) this is done by a witness who examined the copy produced with the original, or it may itself be produced by the Officer. He may, lastly, show that the Defendant was in possession of them, and that he demanded their restitution.

The Plaintiff must prove the Defendant to have been in possession of the Goods when he demanded them ; for if he had parted with them before they were demanded, he would not be liable. (*g*)

So it must appear from the copy of the Record produced, that the prosecution was for *Felony* ; (*h*) for if it appears that it was for Fraud only, as by obtaining them by false pretences, the Owner cannot recover them.

(*d*) 5 Term Rep. 604. 6 East. 17. 7 East. 5.

(*e*) 2 Inst. 714. 2 Esp. Dig. N. P. 42.

(*f*) 2 Term Rep. 750.

(*g*) 2 Term Rep. 750.

(*h*) 5 Term Rep. 175.

4. In this form of Action, (i) questions are continually occurring as to *Bills of Sale* given as security, or supposed security for Debts : Assignments made for the benefit of Creditors, or such conveyances as are intended to divest the property in Goods out of the Party making them, and which are sought by *bonâ fide* Creditors to be set aside on the ground of Fraud. (k)

A Debtor may give a preference to a *bonâ fide* Creditor or Creditors, (l) and if he under such circumstances has taken a Bill of Sale, Assignment, or Security by Warrant of Attorney voluntarily given, may stand on his rights, on giving in Evidence that the debt for which the Bill of Sale, Assignment, or Warrant of Attorney was given, was actually and *bonâ fide* due to him, and the security given to protect it.—2. He must next show, that having so obtained that security from his Debtor, that he immediately proceeded to give effect to it, (m) by taking possession of the property passed by the Bill of Sale, or other Security, and proceeding to dispose of it in due time, or by entering up Judgment on the Warrant of Attorney immediately.

This Evidence is given by showing how the debt was contracted ; as by Bond, Bill, Note, or for Goods sold. The fact of entering and taking possession may be proved by the person put into possession, and the signing of the Judgment and Execution as before-mentioned in similar cases.

(i) 2 Esp. Dig. N. P. 43.

(k) Statute 13 Eliz. Cl. 5.

(l) 5 Term Rep. 236.

(m) 5 Term Rep. 420.

To give effect to these securities, if the validity of them is impeached, (n) the Party who relies on them, whether he is Plaintiff or Defendant, must be prepared to prove an actual and *bonâ fide* taking possession of the effects under the Bill of Sale or Assignment; (o) for which purpose the best witness is the person put into actual possession, and he must prove, that from the time of his taking possession the original Owner was suffered to exercise no act of Ownership whatever; for if he did, as it would be incompatible with the supposed assignment of all his property, it would defeat it.

So it is always adviseable that this person so put into possession should be a stranger; for to give possession to one of the Party's own family, as to his Son, for example, so that things would appear to go on as before, it is a very suspicious circumstance.

Of the Evidence for the Defendant in Cases of Bills of Sale, or such Securities.

Where Fraud is imputed in the possession of Goods, as set up to defeat the claims of *bonâ fide* Creditors, on the ground that they really belong to the person who has parted with the possession of them, the Evidence which the Defendant may bring forward to meet it must be attended to.

1. The Defendant may show a settlement made before

(n) 2 Esp. Dig. N. P. 43.

(o) *Twyne's Case*, 3 Co. 80. 1 Esp. N. P. C. 205. 2 Term Rep. 594. 2 Term Rep. 527.

marriage of all his household and other effects, (p) and that he has continued in consequence in possession; but that the effects were really at the time conveyed to the Trustees, to whom, as Trustees, they belong. To establish this he must produce his settlement, and prove the execution of it by the subscribing witness. He should also prove the time that the marriage took place; if the settlement was before marriage, it is a complete answer to any supposed Fraud; if it was after marriage, the Defendant must prove a portion paid in pursuance of prior articles: for a voluntary settlement wanting that circumstance would be void as against Creditors. (q)

5. Questions respecting the property under *Bankruptcy* occur in this Action more frequently than in any other. The Evidence required in support of the Commission has been treated of before in the Chapter of Assumpsit; they are necessary to be proved in all cases in which the Assignees are Parties; but the question as to what is, or is not, to be taken to be property belonging to the Bankrupt's Estate is here to be considered.

This question arises, for the most part, under the Statute 21 Jac. I. c. 19, (r) whereby Goods and Chattels whereof the Bankrupt at the time of his Bankruptcy had the possession, order, or disposition by consent and permission of the true Owner, and hath taken on himself the sole alteration and disposition as Owner, shall belong to the Assignees, and be deemed part of the Bankrupt's Estate.

(p) Cowp. 32. 2 Term Rep. 597.

(q) 2 Esp. Dig. N. P. 45.

(r) 2 Esp. Dig. N. P. 72.

This Action is, as far as respects the Statute, to try how far the Assignees are entitled to Goods and Chattels which actually belong to other Persons, (*s*) but over which the Bankrupt having exercised a right of disposition, they are deemed to be his, and to pass to the Assignees.

When, therefore, the question arises between the Assignees and the real Owners of the property to which the former claimed title, it is matter of Evidence with which the Assignees must be prepared ; namely, what acts the Bankrupt has done, apparently of Ownership, or how the Goods have been under his care with an apparent power of disposition : as if they made part of his Stock in Trade, or were sold in the course of it ; that can be proved by persons employed in his Shop or Warehouse, and clearly binds the property. So if the Bankrupt had mortgaged his Stock in Trade, and the Mortgagee had suffered him to remain in possession, (*t*) and he becomes Bankrupt, the Mortgagee has lost his title to it, by having suffered the Bankrupt to keep the possession.

Of the Evidence for the Defendant in cases of Bankruptcy.

Questions of Evidence, under this head, are of much importance to be considered, as affording a defence to the claims of the Assignees ; by showing in Evidence that the apparent possession of the Bankrupt is not such as the Statute contemplates ; and, therefore, furnishes matter of defence against them.

These matters of defence are several ; as—

(*s*) 9 East. 215. 1 Bos. & Pull. N. R. 67.

(*t*) 1 Wils. 260.

1. The Defendant may show, (u) that although the Goods claimed, made part of the Bankrupt's Stock in Trade, that he was a *Factor* only, and had the Goods to sell for the Owner, and whose property they were. In this case, the Defendant must give in Evidence, and prove the Goods to be his: that they were sent to him, the Bankrupt, as a Factor in that way of trade, for sale only. For that is not such an order or power of disposal as the law contemplates.

2. He may show, that the Goods came to him in the character of an *Executor or Administrator*; (x) in that case, he must give in Evidence the Probate of the Will, or letters of Administration to the person deceased, whose Goods he must prove those claimed by the Assignees to have been.

3. He may give in Evidence, (y) that the Goods were lodged with him only for a temporary purpose, as to be warehoused till they were shipped, by showing in Evidence, by a witness who knew the fact to be that they were so left with him for that purpose. (z)

4. That the Bankrupt had been employed on the Goods with power only to work on them. (a)

2. Of the Evidence for the Plaintiff in Trover, as it respects the Person.

It has been already observed *ante* 234, that a special

(u) 2 Esp. Dig. N. P. 77. 3 P. Wm. 185.

(x) 1 Atk. 158.

(z) 1 Atk. 185.

(y) 2 Esp. Dig. N. P. 74.

(a) 3 Term Rep. 316.

property in the Goods entitles the Plaintiff to maintain Trover. The principal cases which occur are—

1. *A Carrier* to whom Goods of others are entrusted to be carried, (b) if they are tortiously taken from him, may maintain this Action in his own name; but he must prove that he is a Carrier, or entrusted to carry the Goods in question, and that they were taken while they were in his custody.

2. *The Sheriff* who has taken Goods under a writ of *fieri facias*, (c) if any person tortiously takes them away, may have Trover for them. He must prove the Writ of *fi. fa.* directed to him, by an examined copy of it: the making out of his Warrant to a particular Officer who seized the Goods, and was in possession when the Defendant either took them, or got possession of them, and refused to deliver them after demand.

3. *The Lord of the Manor* may have Trover for an *Estray* taken on his Manor; and that, during the year and day, against a stranger who has wrongfully possessed himself of it, and refused to deliver it up. But the Plaintiff must show that he is Lord of the Manor, and that the animal came on the Manor as an *Estray*; that as such, it had been taken and impounded, and was in his rightful possession when taken. (d)

4. *A Tenant* of a House, let with any moveables belonging to it, if it is blown down during the term, and a stranger takes away any of the moveables or timber which

(b) 2 Esp. Dig. N. P. 83. 1 Mod. 31. (c) 1 Lev. 282.

(d) Bull. N. P. 33.

belong to the house, and refuses to redeliver them, may maintain Trover for them, though the ultimate property is in the Reversioner. But he must show, at the Trial, that he was Tenant, and intitled to them; by what means the Defendant got possession of them; and a demand on him to restore them, and his refusal.

5. In the cases now put, the Plaintiff had a special property in the things, but possession alone is good against a mere stranger; as—

A person who *finds* any thing by accident, acquires thereby such a property in it by reason of the possession, that if it is taken away from him by any one except the Owner, he can maintain Trover, for he thereby acquires a special property in it against all the world but the rightful Owner.(e)

So if a man even tortiously becomes possessed,(f) as by having wrongfully cut property growing on a Common, yet he may maintain Trover for it against a stranger who has taken it away; and in these cases last put, the Plaintiff may rely only on his having the possession: for as against a stranger he is never called upon to prove more than the possession of the Goods: it is yet always adviseable to be prepared in such cases with Evidence of the property, and to show how it was acquired.

6. *Executors or Administrators* may maintain this Action for Goods taken and converted in the lifetime of the Testator, (g) or in their own time. In which case, the

(e) 1 Stra. 505.

(f) 3 Wils. 332.

(g) 2 Esp. Dig. N. P. 83. Cro. El. 377. 1 Stra. 60.

Plaintiff must prove that the Goods belonged to the Testator or Intestate; that the Defendant wrongfully became possessed of them; that a demand was made of them by the Testator in his lifetime, or by the Executor or Administrator after his death, and a refusal or non-delivery of them.

7. *Husband and Wife* may join in this Action for Goods which were the property of the Wife before marriage,^(h) and before that time came to Defendant's possession, and which he refused to redeliver. The Plaintiff in this case must prove their marriage; that the Goods belonged to the Wife before marriage, and were in Defendant's possession without any right to them being demanded, and refused.

3. *Of the general points of Evidence required in all cases on the part of the Plaintiff.*

It has been observed, *ante*, page 234, that the Plaintiff is bound to prove.

1. Property, either actual or special.

Actual property is proved by Witnesses, who know the things for which the Action is brought to have been the Plaintiff's, as in Trover for a Horse, that the Plaintiff bred him, or has had him long, and used or rode him. This Evidence is rarely required, except where the property is contested by the Defendant, as in the case just mentioned, the Defendant may claim the Horse as his

(h) 2 Lev. 107. 1 Vent. 260.

own, and give Evidence by marks, or otherwise, by Witnesses, that the Horse was his : in such case the Action turns solely on the property, as it is question of Evidence for the jury.

Evidence as to special property has been already mentioned.

2. The Plaintiff must show that the goods were, when taken, in his actual possession, or had been so previous to it ; and that at the time, as well as when demanded, he had a right of actual possession ; for a right of future possession will not support the Action.

Thus, if the Plaintiff's Horse had strayed and got into Defendant's possession, who refused to deliver him, the Plaintiff having an immediate right to the possession of his horse, may maintain Trover for him, and then by giving Evidence at the Trial, that he was possessed of the horse before he strayed : that the horse was found in Defendant's possession, who refused to deliver him up on demand, the Plaintiff will have a verdict.

But if the Plaintiff had hired out the horse to the Defendant for a month, *e. g.* to do certain work, and before the month expired he demanded the horse, and being refused, brought an Action of Trover : he would not recover, for he had no right to the present possession of him.

8. The Plaintiff must prove the Defendant to have been in possession of the things for which the Action is brought at the time they were demanded, or at some time previous to it ; all which may be done by a Witness, who saw

them in Defendant's possession, or who knows of a previous delivery of them by the Plaintiff to the Defendant : but the Plaintiff is not required to show *how* the Defendant became possessed of them, as he might have taken them tortiously ; and though he may have done so, yet the Plaintiff may consider that he came by them lawfully, or by *finding*, in the words of the Declaration, and proceed for the conversion, after demanding them.

4. The *Plaintiff* should, in every case before the Action brought, *(i)* make a demand of the Defendant to deliver to him those things for which the Action is brought, or to pay the value of them, or make satisfaction. *(k)* This may be either in writing, or by a Witness duly authorized by the Plaintiff, or by the Plaintiff himself. If it was in writing the Plaintiff should keep a copy of that delivered to the Defendant, *(l)* and give notice to the Defendant to produce at the Trial that served upon him ; and in case he does not, he must prove by a Witness that the copy produced of the Demand was compared by him, and is a copy of that served on the Defendant.

If the demand was made by a Person authorized by the Plaintiff to make it, that Person should be called to prove it.

If it was made by the Plaintiff himself, a Witness should be called at the Trial, who was present, and heard the Plaintiff make the demand.

But though I have laid down the Rule thus generally,

(i) 2 H. Black. 135.

(k) 2 Esp. Dig. N. P. 31.

(l) 2 Esp. Dig. N. P. 22.

and advise in every case a demand to be made, if in fact the Plaintiff can prove an actual tortious taking,^(m) or an actual conversion of the goods, such as a sale of them to a third person, that Evidence will be sufficient without proof of any demand. But there is more facility in proving a demand, than proving an actual conversion.

2. It is also laid down, *ante* 234, as a settled principle of the Action of Trover, that the Plaintiff must prove *a conversion by the Defendant* of the things for which the Action is brought; and the words of the Declaration are “converted them to his own use:” and all the books speak of a demand and refusal as Evidence of that conversion; this requires explanation in settling the Evidence for the Plaintiff.

1. It is not necessary for the Plaintiff to show *a refusal in terms by the Defendant*, to deliver the goods. It is sufficient to prove a demand and an omission by the Defendant to deliver them before Action brought. An absolute refusal by the Defendant to deliver them is fully sufficient Evidence of a conversion; but the Defendant may assign a sufficient reason for not doing it,⁽ⁿ⁾ which will negative the conversion, as, *ex. gr.* that he keeps the goods for the right owner, whom he does not know the Plaintiff to be. So if he claims a lien on them, the Plaintiff should in such case, therefore, go further, and prove that the Defendant absolutely disputed his right to them.

It is not necessary for the Plaintiff to show that he has

(m) Sid. 254.

(n) Esp. N. P. C. 83. 3 Campb. 215. 2 Esp. Dig. N. P. 96.

absolutely *lost his goods*, and which the Defendant has taken : (o) the Defendant by wrongfully taking the goods for a time, or partially using them, is guilty of a conversion *pro tanto* ; as, *ex. gr.* if a man takes another's horse, and rides him, though he afterwards brings him back, the owner may still maintain Trover, on proving at the Trial such taking, and though he will not recover the value of the horse, he will recover damages for the use of him. (p)

If a Person (q) entrusted to carry a cask of liquor, draws off part, and fills it up with water, it is a conversion of the whole, and may be so declared; and, being proved, the whole value of the cask may be recovered.

So a delivery at a place, or to a person, contrary to the owner's orders, is a conversion in the Person who has done it. (r)

Of the general Evidence in this Action on the part of the Defendant.

The Evidence on the part of the Defendant, is either a denial or disproval of the Plaintiff's right to maintain the action, or the assertion of a right in himself to retain the things for which the Action is brought.

The only Plea in Trover is *Not guilty*, under which the Defendant may go into any defence he has.

1. The Defendant(s) may show that though the pro-

(o) 2 Esp. Dig. N. P. 87.

(p) Golds. 155.

(q) 1 Stra. 576.

(r) 4 Term Rep. 460.

(s) 2 Esp. Dig. N. P. 82.

perty of the goods is in the Plaintiff, he had *no right of present possession*. As, *ex. gr.* if a landlord had let a house, ready furnished, for a year ;(*t*) and before the expiration of the year brought Trover for the furniture, the Action would not lie.

In that case, the Defendant should give in Evidence the terms upon which he had the goods, and thereby show an existing right of possession in himself.

2. The Defendant may dispute *the property of the Plaintiff* in the goods.(*u*)

As if goods were condemned in the Exchequer,(*x*) the property is thereby completely divested out of the owner, so that he can maintain no Action : in such case, therefore, the Defendant must give in Evidence examined copies of the proceedings and judgment in the Exchequer, by which it will appear that the goods taken were those for which the Action was brought, and that they were condemned.

So where an Exchange is made of horses, *ex. gr.* and possession given, neither party can maintain Trover for his horse, for the property is completely changed by the exchange and delivery : but both these facts must be proved at the Trial.

3. The Defendant may show a property (*y*) in himself in the thing sued for, as *e. g.* That he became *possessed of it by legal transfer, or by a sale in market overt*.

(*t*) 7 Term Rep. 9.

(*x*) Sir T. Ray. 336

(*u*) 7 Term Rep. 9.

(*y*) 2 Esp. Dig. N. P. 84.

As where a bank-note is lost, the owner may have Trover against the finder for it.(z) But if the finder had passed it to another in the course of dealing, in that case the latter would have obtained a clear title to it, and Trover could not be supported. But, in that case, the Defendant would be bound to show at the Trial how he became possessed of it, and that he took it in the course of business, or rather was not himself the finder of it.

So if a horse was stolen, (a) though selling him in market overt, might change the property, if all the requisites of statute 2 Ph. and M. ch. 7. were complied with, yet, if sold by a false name, or not regularly booked, the property is not changed, the sale not being regular in market overt.

3. The Defendant may justify the detention(b) of the goods, that is, a refusal to deliver them to the rightful owner, on the ground that he has a *lien* on them for a demand of his own.

This lien being either in consequence of an express contract between the parties, or as arising from the usage of trade, if the Defendant relies on it, he must, in the first place, establish by Evidence, the existence of a lien, either by custom or contract, and, secondly, that they came fairly into his possession in regular dealing, and lastly, that he had a demand against the Plaintiff, to a certain extent, which attaches on the Defendant's goods for which the Action is brought, that is, as connected with the nature of the demand, and therefore claims a right to retain them.

(z) 1 Salk. 126.

(a) 1 Leon. 158.

(b) 2 Esp. Dig. N. P. 87.

These matters are proved by Witnesses acquainted with the facts: an agreement for a lien may be proved by one Witness; but the usage of trade or a particular business should be proved by more than one, if possible, and that by persons who have known it acted upon, and not merely heard of it.

Liens have been recognized in the following businesses; and as they have been so settled by repeated decisions, there is no necessity in such cases for the Defendant to bring general Evidence of liens arising from such particular cases in these particular trades or businesses. The Defendant may rely on the decided usage, but observing that in some there is a lien for a general balance, in others not.

1. In the case of Factors, they have a lien for a general balance.(c)

2. Bankers, for a general balance.(d)

3. Wharfingers, for a general balance.(e)

4. Manufacturers of different descriptions for the work done by themselves, as Dyers, Packers, Printers, for a general balance.(f)

5. Pawnbrokers, for the advance on the goods themselves.(g)

(c) 2 Esp. Dig. N. P. 87.

(d) 2 Burr. 936. Cowp. 251. 2 East. 221. 3 Term Rep. 783.

(e) 1 Esp. N. P. C. 66, 109. 9 East. 12.

(f) 4 Burr. 2214. 6 Term Rep. 14. 6 Atk. 627. 3 Mau. & Selw. 168.

(g) Pre. Ch. 419. 2 Vern. 691. 1 Atk. 236.

6. Innkeepers, while the goods brought to their Inn remain with them : if they suffer them to go away, the lien is lost.(*h*)

7. Carriers, for the carriage of the particular goods carried ; not for a general demand or balance, unless agreement or usage is strictly and fully proved.(*i*)

7. An Attorney, on all deeds and papers delivered to him by his Client in the course of business, or which have so come to his hands.(*k*)

8. Brokers, who have given their Acceptances for Goods which they are afterwards to sell, have a lien on the goods to the extent of what they agreed to advance.(*l*)

4. The Defendant, if he has rightfully come to the possession of the Goods, may show that he was not guilty of a conversion of them to his own use, which is necessary to fix him in this Action.(*m*)

As if Goods are delivered to a Carrier to carry, and they are lost or stolen ; if Trover is brought, the Carrier, on giving in Evidence at the Trial, that the Goods were so lost or stolen, the Plaintiff cannot have a verdict ; for the Defendant was guilty of no conversion to his own use.(*n*)

5. The Defendant may show, in answer to the Plain-

(*h*) 3 Bulst. 268. Salk. 388.

(*i*) 2 Ld. Ray. 752. 6 East. 524. 7 East. 224.

(*k*) Doug. 226. 1 Mau. & Selw. 535.

(*l*) 3 Esp. N. P. C. 182. (*m*) 2 Esp. Dig. N. P. C. 86.

(*n*) 5 Burr. 2825.

tiff's case, that the Goods for which the Action was brought, were *pawned* with him.(o)

For this purpose he must give in Evidence that he advanced money to Plaintiff, prove the delivery of the goods to him, on those terms, and that he was to detain the Goods as a pledge till the money he had advanced on them was repaid.

6. It is no defence for the Defendant to show that the Goods did not come to his own use ; for if a servant, employed to receive Goods on his Master's account, disposes of them wrongfully, whether with or without his Master's orders, the latter will be liable in Trover for the amount.(p)

7. The Defendant may show, that he had a joint property in the Goods, sought to be recovered in Trover ; as that they were Tenants in common of them.(q)

As in the case of joint owners of a ship, which, if one takes, the other cannot maintain Trover for it ; but if he destroys it, then Trover will lie.(r)

8. The right of the Tenant to carry away the materials of any erections made by him on the Land or Premises occupied by him, on the expiration of his term, often raises an important question at Nisi Prius : every erection fixed to the freehold *primâ facie* belongs to the Landlord, and he may maintain Trover for it if taken away ; but as

(o) 2 Esp. Dig. N. P. C. 89.

(p) 2 Esp. Dig. N. P. C. 92. 1 Wils. 828.

(q) 1 Term Rep. 658.

(r) Co. Litt. 200.

there are many things of that description, which the Tenant is warranted in taking away, he then should be prepared with Evidence accordingly.

This Tenant's right depends on the Custom of the County, and on positive determination of Law.(b)

As if the custom of the County is, that the Tenant of a Farm may, at the end of his Term, carry away, *e. g.* the timber of a Barn erected on blocks or timbers lying on the ground, that is a good custom : in that case, the Defendant must call Witnesses to prove the established and received usage and custom of the County, not from opinion or hearing only, but from having known it acted on ; then prove that the erection in question was within the usage.(c)

(b) 2 Esp. Dig. 100.

(c) Bull. N. P. 34.

CHAPTER XIII.

OF SETTLING THE EVIDENCE IN THE ACTION OF
TRESPASS ON THE CASE.

IN settling the Evidence in cases of Actions on the Case, which are more numerous than in any other form of Action, this general Rule is to be observed, and which in some respect varies from the rules of Evidence in other Actions, that a less degree of strictness of proof is required : it being laid down as a rule, that material averments are only put in issue, and nothing more.(a)

It may be necessary to exemplify this Rule by some examples, which in similar cases may be applied.

The Plaintiff declared in Case for negligence, in running down his Boat *near* the Halfway Reach in the river Thames ; the injury was proved to have been committed *in* the Halfway Reach. It was objected to as a variance, but was held not to be so, for the injury was the ground of Action ; and if that was proved, it was immaterial where it was committed.(b)

So where the Declaration stated an injury done to the

(a) 2 W. Blackst. Rep. 840.

(b) 4 Term Rep. 558.

Plaintiff's House, situate at *Sheerness*, in the county of Kent; and, at the Trial, it appeared that the House was situated at *Minster*, near *Sheerness*; it being an immaterial averment where the House stood, provided the injury stated in the Declaration was proved to have been committed, the variance was held not to be good ground of nonsuit.(c)

But any variance in the Evidence of a material averment is fatal; and *that* is material, which states the Plaintiff's ground of complaint. As if the Plaintiff was to declare for a disturbance in a right of way across a certain Close, called *Home Mead*, and in Evidence it appeared that the Close over which he claimed a right of way, was called *Cow Meadow*, and that *Home Mead* was a different Close. As the Plaintiff claimed title to a right in the wrong Close, his Evidence would not support it; and being his title, it was a material averment, and the variance fatal.

The principal heads of injuries in this case are such as affect.—1. The Person.—2. Personal Property.—3. Real Property; and, lastly, Personal Rights.

1. *Of the Evidence in Actions on the case for Injuries to the Person.*

1. If the Action is against a *Surgeon* or *Apothecary*, for an injury to the Plaintiff's health, he must prove that the Defendant was a Surgeon or Apothecary by profession: acted as such, and was paid or fee'd in that character:

(c) 1 Bos. & Pull. 225.

that he was employed by the Plaintiff to cure some wound or bodily injury. He must then prove, *what* the Defendant did in his attendance on him ; and then call persons of medical skill and experience to give their opinions and Evidence, that the course followed was ignorant, improper, and unskilful ; and the want of cure of the Defendant's wound or malady was the effect of the ill treatment of it. The protracted illness of the Defendant, the expense incurred, &c., are all matters capable of proof, and must be proved by a witness.

2. A *Tavernkeeper* or *Publican*,^(d) who sells bad Wine or Liquors to a Customer, by which his health is affected, may be sued for damages in this Action. In such case the Plaintiff must prove, that the Person who sold the Liquors was an Innkeeper, Tavernkeeper, or Publican, and that his House was open for that purpose : that the Plaintiff drank the Wine or Liquors furnished there to him by the Defendant, and then show clearly that his illness proceeded from the use of them ; this must be done by witnesses.

3. If a Person keeps a Dog used to bite,^(e) or other vicious animal, as a Bull, *e. g.* and a Person has been hurt by either, he may sustain an Action for the injury. In this case, it is indispensable to bring Evidence home to the Defendant, the Owner of the animal, that he *knew* that it was vicious, and kept it after notice.^(f) That is matter of *vivâ voce* Evidence. The Defendant may defend himself by showing that the Dog or Bull were kept

(d) 2 Esp. Dig. N. P. 108.

(e) 2 Esp. Dig. N. P. 109. 1 Ld. Raym. 606.

(f) Brook v. Copeland, 1 Esp. N. P. C. 203.

in proper places ; the Dog *e. g.* for defence of his Premises, and the Bull in a Close ; and that the hurt the Plaintiff received proceeded from his going into either place where he had no business.

2, *Of the Evidence in cases of injury to Personal Property, by Officers or private Persons.*

This is first by Officers :—

1. In Trespass against the *Sheriff*, it should be observed, that he being by law answerable for the acts of his Officers, where he is sued for any act of theirs, and his name only appears on the Record, the Officer who did the wrong must be connected with the Sheriff, by showing the Sheriff's Warrant directed to him to act.—See *ante*, 126.

Having observed that precaution in settling the Evidence, is necessary in every case : the principal heads of Action in this case are,—1. Against the Sheriff for Escapes.—2. For Informal Executions.—3. For False Returns.

In the case of *Escapes*, I have already given the Evidence required, in Debt for an Escape where the Defendant is in custody on final Process, (page 126.) The case of an Escape here is, where there has been an Escape on *mesne* Process, in which case the damages are uncertain.

In this case, the Plaintiff must prove the suing out of the Writ, either by the production of the Writ itself, or of

an examined copy from the Treasury when returned. If *cepi corpus* is indorsed, it proves the arrest: if *non est inventus* is returned, when in fact the Defendant was arrested, there are two Counts always laid in the Declaration, the one for an Escape, the other for a false Return; and where that is so, the Plaintiff, to fix the Sheriff, must show that a Warrant was made out by the Sheriff to one of his Officers; that that Officer was seen to arrest, or have the Defendant in his actual custody: and that he was afterwards seen at large.

It is indispensable for the Plaintiff, if he goes for an Escape, to prove that the Defendant in the original Action was in the custody of the Officer, who had the Writ against him, and to whom the Warrant was directed. If the Defendant was seen openly and at large after the delivery of the Writ to the Sheriff, and a Warrant granted on it, unless an actual arrest took place by that Officer, an Action for an *Escape* will not lie: the form of Action then is, *Case against the Sheriff for negligence in not arresting the Defendant*; but, to subject the Sheriff in that case, Evidence must be given by the Plaintiff that he informed the Sheriff's Officer where the Defendant could be found, or pointed him out to him, notwithstanding which he neglected to make his caption.

But the mere fact of the Defendant being seen at large will not subject the Sheriff to an Action for an Escape, as he is bound, if sufficient Bail is offered, to let the Defendant remain at large until the return of the Writ. The Plaintiff must, therefore, wait until the return of the Writ; and if no Bail Bond has been taken, or Bail above put in, or the Defendant surrendered, the Action will lie. In

settling the Evidence, therefore, it will be necessary to see if any of these matters have taken place; and, if they have, the Action will not lie.

The Evidence for the Defendant, the Sheriff, in this particular case, should be attended to.

What is just now stated, on being given in Evidence by the Sheriff, is matter of defence for him.

But he may give other matters in Evidence—as, he may show that the Defendant, when in custody on *mesne* Process, was *rescued*.(g) This must be circumstantially proved by a witness who saw the circumstances, and can prove the violence used to the Officer, in consequence of which he was forced to give up the Person arrested.

2. Another ground of this Action, against the Sheriff, is for some irregularity in executing a Writ of *fi. fa.* This may be by the Landlord of the Defendant in the original Action ;(h) where the Sheriff *has neglected to reserve a year's rent*, he having had notice that so much was in arrear to him : for that purpose he should show, that the Defendant in the Action was his Tenant ; that there was so much in arrear of rent ; that he gave notice to that effect to the Sheriff. This last should be proved by a written notice served on the Sheriff which he should have notice to produce ; and a witness should then prove a copy compared with that served, and then prove the sale of the effects by the Sheriff.

So the Sheriff may be liable in this Action, at the suit

(g) Cro. Jac. 409.

(h) Stat. 8 Ann. c. 14. 1 Stra. 92, 212.

of the Defendant, for misconduct in the sale of his effects, and for not returning him the overplus after all due allowances.(i)

As if he sold effects of the Defendant for 5*l*. which the Defendant proves were worth a much larger sum, or in an improper way. If the Party proves these facts by witnesses, the Sheriff will be liable. So if he charges any deductions; as for rent paid to the Landlord: he must prove the payment, and the Landlord cannot be a witness to prove it. He is, therefore, bound to prove the tenancy and rent in arrear, as in the case last mentioned.

3. So if the Sheriff *executes first, a Writ delivered to him subsequent to one before in his hands*, he will be liable in this Action.(k) In that case, the Plaintiff must prove the first Writ by production of it, or by an examined copy if returned. He must also show the time when it was delivered to the Sheriff. He must then give in Evidence, that there were Goods of the Defendant's, on the Premises when he delivered the Writ to the Sheriff, and which he either has not levied on, or returned *nulla bona* to the Writ of *fi. fa.* so first delivered to him.

This question is raised in an Action against the Sheriff for a *false return*; therefore, where he has returned *nulla bona*, the Plaintiff, by giving the Evidence just mentioned, falsifies the return.(l)

Under this head, questions of property in Goods taken

(i) 3 Campb. 524.

(k) Salk. 320.

(l) 1 Wils. 44.

are tried ; for as the Sheriff is liable in Trespass for levying on Goods under the *fi. fa.* not the property of the Defendant in the Action, and that property is often doubtful ; if he is either indemnified, or takes upon himself to decide between two claimants, in whom the actual property is, and makes his return accordingly, and the other Party chooses to contest it, he does it in an Action for a false return. In that case, the whole of the case will depend on proof of actual property, which is matter of fact to whom the Goods really belong.

2. For any breach or neglect of his duty, this Action lies against an *Attorney*.^(m)

As, *ex. gr.* if the Attorney neglects to charge a Defendant in execution in due time, by reason of which he is superseded,⁽ⁿ⁾ the Action will lie against the Attorney for his neglect. The Evidence in that case would be, the retainer of the Defendant as Plaintiff's Attorney ; that the Defendant in the original Action had been arrested or taken in execution at his suit, and committed to Prison : this is proved by the books from the Fleet, the King's Bench, or other Prison where the Defendant was in custody ; by that Evidence too the actual time of his committal will appear. The Officers from the same Prison will produce the supersedeas, or order for his discharge, which will also show the grounds of it, that is in the present case, by reason of the Defendant not being charged in execution within three Terms according to the practice of the Court. If the Plaintiff has suffered from the discharge of the Defendant in losing his Debt, and it

(m) 2 Esp. Dig. N. P. 122. (n) 2 Wils. 325. 4 Burr. 2060.

is so laid in the Declaration, he may give that in Evidence of his damages.

The Evidence must necessarily vary according to the different cases of neglect by the Attorney, and be settled accordingly. As if, in a purchase, the Attorney takes upon himself to decide upon the validity of the title, and it turns out to be bad, or neglects to do what is necessary to complete it, in consequence of which his client loses his money, the Attorney will be liable: in that case, the Plaintiff must prove that he employed the Defendant: that he prepared the conveyances which must be produced and proved. The receipt on the back, proves the payment of the money on proving the Party's hand-writing to the receipt. He must then prove that he lost the benefit of his purchase, if Lands or Tenements, by showing a recovery against him, or eviction, by a Person having title, as a judgment in Ejectment, *ex. gr.* against him, which should be produced and proved: if the neglect was of something necessary to complete the conveyance; as neglecting to have a proper memorial of an annuity by reason of which the Court set it aside, the rule of Court so ordering it should be produced, and also an examined copy from the Office of the Clerk of the Rules, which states the ground of objection to the validity of the annuity, by reason of which it was set aside.

3. *Justices of Peace* are liable in this Action for certain breaches of their duty ;(o) as if he refuses Bail when

(o) 2 Esp. Dig. N. P. 124.

offered, and where it ought to be taken. In such case, the offence for which the Party was in custody, is proved by a copy of the committal to Prison, and then the offer of Bail to him must be proved by the Person who did it.

It has been before observed, (p) that where a conviction of a Justice has been quashed, and he being liable in damages for any injury which the Party has suffered in consequence of it, that by Statute. 43 Geo. III. c. 145. the form of Action *must be Case*. Where it is so brought to support the Action, the Plaintiff must prove express malice in the Defendant. This may be done by *ex. gr.* proving oppressive acts done by the Justice ; declarations of enmity to the Plaintiff made by him to others. On the other hand, the Justice may show that he had good ground for his Proceedings, by calling the witness on whose testimony he was convicted, and so rebut the presumption of malice.

4. Actions against *Carriers*, for negligence, are brought in this form of Action, though they may also be sued in *Assumpsit*.

Carriers being liable for the loss of all Goods entrusted to be carried by them, (q) unless the loss has happened from the act of God, or the King's enemies ; from the default of the Party sending them ; or by reason of a notice given by the Carrier of his non-responsibility under particular circumstances ; in all cases, the Plaintiff must prove, that the Defendant was a common Carrier, either by land or water, announcing himself to the world as such, or that

(p) Vid. Ch. of Trespass.

(q) 2 Esp. Dig. N. P. 125.
L 1

he expressly undertook to carry the things for hire : these facts are matter of parol Evidence. He must next prove the delivery to the Carrier, either in person, or to the servant regularly employed by him in the business, or at the House, Inn, or Wharf; where he was in the habit of receiving Goods, or where he advertised or notified that Goods were to be left or received. This must be done by the witness who left them or delivered them ; and he must say where he delivered them : if he got a receipt for them, he should produce and prove it ; and if they were entered in a book kept by the Carrier, notice should be given to produce it. The Plaintiff must next prove how the Goods were directed, and that they had not been received, or were lost ; and, lastly, their value.

The defence for the Defendant must be on one of the grounds of exemption above stated.(r)

Thus, if Goods were sent by a Hoy, and she was sunk in a sudden squall of wind, that is the *act of God*, and excuses the Carrier. The Law is the same if the Hoyman was obliged to throw some Goods overboard to lighten the vessel, or save the passengers in a storm.(s)

So if Goods were set on fire by lightning, it would be deemed the act of God : but in case of Goods being consumed by fire, the Defendant must prove the fire to have proceeded from that cause.(t)

To exempt the Carrier from liability, by reason of the Goods being taken from him by an armed force, they must be foreign enemies : not Rioters or River Pirates.(u)

(r) 1 Stra. 128.

(s) 1 Roll. Ab. 79.

(t) 1 Term Rep. 27.

(u) 1 Vent. 109. 1 Term. Rep. 33.

It should, therefore, be shown of what description the Persons were.

But if a Person will force his Goods on the Carrier when his wagon or vessel is otherwise full ; or puts his Goods into improper packages, and they are lost or damaged, the Carrier is not liable ; when, therefore, this is the case, the Defendant should be prepared with Evidence to that effect.(x)

The general and most usual defence is, that the Carriers have given a notice to all Persons sending Goods by them, that they would not be answerable beyond a certain sum, or for a certain description of Goods, unless they were specifically paid for the carriage of them : a great variety of decisions have taken place on this. (Vid. 2 Esp. Dig. N. P. 128.) It is now held, that there must be that specific notification made to every Person sending Goods : and that the putting up a large board to that effect in the Coach-office, was not sufficient notice, unless knowledge of it was brought home to the Person sending the Goods.

So held by *Abbott*, Ch. Just., at G. Hall, Sitt. after Trin. Term, 1819. ——— *v. Waterhouse.*

5. *Pawnbrokers*, or *Persons who take Goods in pledge*, are the next subject of this Action for any misconduct respecting them, as for losing them, or not returning them on demand ; it being the nature of the contract, that on repayment of the sum advanced on them, the Goods are to be restored.(y)

(x) 2 Esp. Dig. N. P. 126. 2 Show. 127.

(y) 2 Esp. Dig. N. P. 132.

Where this is the case, the Plaintiff has only to give Evidence of the pawning : that is done by producing the Pawnbroker's Ticket, and proving it to be his handwriting, or that of his clerk, who should be called as a Witness, if there is any doubt of his being so employed. If the Person is not a Pawnbroker, but has had the Goods on pledge, the delivery of them on those terms to the Defendant, must be proved : the Plaintiff must next prove the value of them ; and, lastly, a tender of the money advanced on the pledge, and a demand of the Goods. This Evidence, on the part of the Plaintiff, must be given, and may be done by the Witness who did it.

The Defendant may give in Evidence that the Goods were stolen from him, though he otherwise took due care of them : but this would be no answer, if the Plaintiff had previously tendered the sum advanced on them.

6. Another case in this Action, where *Goods have been delivered to another to be kept, or been lent*, and they are lost.(z)

In these cases, the Person who has had them so delivered to him, is only liable where such neglect is imputable to him, as occasions the loss ; and the Plaintiff must always be prepared with Evidence to show that there was gross neglect, or a user of the thing lent, in a manner different from the purpose for which the owner lent it.(a)

Thus, *ex. gr.* if Goods are delivered by a Person to be put on board a ship, and he uses defective tackle which breaks, and the Goods fall into the water and are lost, the

(z) 2 Esp. N. P. 132.

(a) 1 Stra. 681.

party is answerable; for it was gross neglect in him not to have good and sufficient tackle.(b)

So if one lends a Horse to go one journey, and the party to whom he has lent it, takes him another, and the Horse is lost or dies, the party to whom he was lent is liable.(c)

7. Action against *Innkeepers*, for things lost by Persons in their Inns, is another ground of this Action.(d)

To entitle the Plaintiff to recover damages in this Action, he must prove, 1st, That he was a *Guest*, and using the Inn as such, and had been so received: 2. That the House was a common Inn for the reception of travellers, kept by the Defendant: 3. That the loss arose from the act or neglect of the Innkeeper, or his Servants: 4. That the Goods were brought into the Inn, and were the property of the Plaintiff; and were lost or stolen from the Inn, and after being so lodged there: all these matters must be proved by Witnesses, to be called on the Trial.(e)

In answer to that case, however, the Innkeeper may prove, 1. That he told the Plaintiff that his House was full, and that there was no accommodation for him, but the Plaintiff said that "he would shift or take his chance;" for if his Goods were afterwards lost, the Innkeeper would be discharged, for he did not *receive* Plaintiff as a guest. 2. He may show that the Plaintiff was not a traveller or guest, but a neighbour, who asked for a lodging out of kindness.(f) 3. That the Goods were stolen by Plaintiff's

(b) 2 Esp. N. P. C. 262.

(c) Com. Rep. 136.

(d) 2 Esp. Dig. N. P. 133.

(e) Co. 32. 5 Term. Rep. 273.

(f) 1 And. 29. Moor. 78.

own Servant or Companion. 4. That he desired the Plaintiff to put the Goods into a particular place for security, which he did not do, and they were lost, (g) the Innkeeper, in that case, is not liable. 5. That the Plaintiff gave orders to have the Goods disposed of in a particular place out of the Inn; as if he ordered his Horse to be turned out to grass, and he is lost, the Innkeeper is not liable. 6. If the Goods lost are dead ones, the Innkeeper may show, that they were Goods which the Plaintiff left at his Inn, where he himself was not as a guest, and of course, the Innkeeper deriving no profit from them, was not bound to take charge of them: but if he had left a Horse there, inasmuch as the Innkeeper derived a profit from his standing, if he was lost, the Innkeeper would be liable: all these facts must be proved by Witnesses, according as the Defendant relies on them for his defence. (h)

Another ground of Action against an Innkeeper is, *for refusing to receive a Person as a Guest*, who comes to his Inn, and offers to pay for what he has. The Plaintiff, in that case, must give in Evidence at the Trial, that the Defendant's House is a common and open Inn or Public House, and that he required to be entertained in it, which was refused; and that he offered to pay for what was furnished to him: (i) but the Defendant may show that his House was full, and that there was no room.

8. *Maliciously suing out a Commission of Bankruptcy* is another good ground of this Action. (k)

(g) Moor. 158. Caleys Cas. 8 Co. 22.

(h) Salk. 388.

(i) Keilw. 50. Dyer 58.

(k) 2 Esp. Dig. N. P. 135.

In that Action the Plaintiff must give in Evidence, 1. The Commission, by which it will appear that the Defendant was the Petitioning Creditor ;(*l*) and this is done by the production of the Commission itself ; or, if the Plaintiff cannot get at it, by a Witness from the Bankrupt's Office, who will prove the issuing of the Commission on the Defendant's petition, which he will produce, and it will be necessary to prove the Defendant's hand to it. 2. The Proceedings under it should be given in Evidence, by a *subpœna duces tecum* to the Solicitor under the Commission, and to the Assignees ; if not forthcoming, the Gazette should be produced to show the opening of the Commission ; and any of the Commissioners may be called to prove that it was opened, and how it was proceeded in. 3. The Plaintiff must prove that it was superseded, and give some Evidence of bad or malicious motives actuating the Defendant in suing it out. That it was superseded is proved, by producing the writ of *Supersedeas* under the great Seal : a copy of the Lord Chancellor's order on the Petition is not sufficient.(*m*)

If the Plaintiff cannot bring malice home to the Defendant, it is better for him to get an assignment of the Bond from the Chancellor, as in this Action, the Damages are uncertain ; but under the Bond he recovers the whole penalty : in which case the execution of the Bond and the Assignment must be proved.

9. *Deceit in Sales* forms another ground of this Action.(*n*)

(*l*) 3 Burr. 1418.

(*m*) 3 Campb. 60.

(*n*) 2 Esp. Dig. N. P. 136.

To enable the Plaintiff to recover in this Action, where there has been no Warranty, he must show, 1. A sale and a false representation made by the Defendant of the quality or value of the thing sold, which he knew at the time was untrue, and which the Plaintiff could not know.(o) 2. That it was made at the time of the sale, and not afterwards.(p) 3. The Plaintiff may show, that the Defendant used some art to hide the defects of the things sold.(q) What were the representations made by the Defendant, and the time when made, may all be proved by Witnesses, who can speak to those facts. So if the Defendant had sold something not his own, pretending to have a right or title to it, which he had not, the sale should be proved, and the property be proved to be in another, who may be called.(r) If there was a warranty, that should be proved as laid, and be proved by Witnesses to be false. Vid. *ante*, in *Assumpsit*.(s)

10. The case of *giving a Person a false Character* for solvency, by which he gains credit for Goods, ranks under this head. The Plaintiff, in that case, must prove, first, what is laid in the declaration as representing the Party's character for solvency: this is usually laid in general terms, which may have been either by writing, as by letter, which should be produced, and the Defendant's signature to it be proved; or by parol, to be proved by a Witness. He must next prove the furnishing of the Goods in consequence; and the loss of them, the Person recommended being insolvent; and he must, lastly, clearly make out in Evidence, that the Defendant knew the

(o) 1 Salk. 211. 1 Stra. 414.

(n) Finch's Law, 289.

(p) 1 Roll. Rep. 5.

(r) 2 Esp. Dig. N. P.

(s) 2 East. 446.

Person was not to be trusted ; or did it *ex malâ fide*, that is, *ex. gr.* that the Person recommended had some time before had been a Bankrupt : that he was indebted to him, and he sought to pay himself by the produce of the Goods : or was himself to be in any way a gainer.(*t*) This is indispensable ; for, if the Defendant himself believed the Person to be solvent, no action will lie.(*u*)

11. For any *nuisance* committed by one man against another, either to his House or Land, this Action also lies.

Such as *darkening the lights* of his House, by raising some erection near it. In that Action the Plaintiff must prove that his House had been erected at least twenty years, and that it had enjoyed the light, of the privation of which he complains, for that time : 2. That the Defendant had made the Erection, and that the effect of it was to make his House dark and uncomfortable : this is proved by Witnesses, who know the Plaintiff's House, the time it has stood, and who can speak to the effect of the Defendant's erection.(*x*)

The same mode of proof takes place, when the nuisance is for overhanging the Plaintiff's House, or filling it with noisome smells : in those cases the Plaintiff need only prove his possession, and call the Persons, living in the House, to state the inconvenience caused, or others who have perceived the nuisance. Nuisances to the land are proved in like manner(*y*) by calling Witnesses to the facts.

(*t*) 2 Esp. Dig. N. P. 139. 2 Bos. & Pull. 141.

(*u*) 2 East's Rep. 92.

(*x*) 2 Esp. Dig. N. P. 143. 9 Co. 58. 2 Saund. 175. in note.

(*y*) 2 Esp. Dig. N. P. 145.

In Settling the Evidence under this head, it must be observed that the Evidence should prove the fact to have taken place in the County laid, as the Action is local.(z)

12. *Disturbance* in the enjoyment of any right is also a ground of this Action ; as a *right of way, right of common, right of water*, and other similar rights.(a)

If the Action is for disturbance of a *right of Way* : the Plaintiff must first give Evidence of his right to the way, as it is over the soil of another. If he claims it by grant, he must produce the deed which gave it, and call the subscribing Witness to the Execution ; unless it happens to be more than thirty years old, in which case the bare production of it is sufficient ; but the Plaintiff must also prove that he used the way during that time.

If the right of way is claimed by *prescription or usage*.

That is supported by Evidence of Persons of considerable age who have known the way used without interruption as long as they can remember ; this presupposes some grant of it, but which has been lost.(b)

In one case it is said that twenty years' enjoyment uninterruptedly, is a title to go to the jury. *Campbell v. Wilson*, 3 East. 294.

(z) 1 Taunt. 379.

(a) 2 Esp. Dig. N. P. 147. Co. Litt. 5. Cro. Jac. 170. 5 Taunt. 511.

(b) 11 East. 375. in note. Bull. N. P. 74.

In Settling the Evidence under this head, as well as in all cases of disturbance of right, great accuracy is required, to see that the proofs correspond with that right laid in the declaration, as any variance will be fatal; as if the Plaintiff was to lay his right of way from A. to B., and the *termini* were wrong, it being from A. to C. it would nonsuit the Plaintiff; (c) and so in other cases. As if he was to claim a right of carriage way, and he proved a drove way only, he would fail. The Evidence in case of a disturbance of right of common is founded on similar rules, that is, the Plaintiff must prove his right precisely as he lays it; if laid to be for one species of cattle, and that of another is proved; for a given number, and a different one is proved; it is fatal. The Plaintiff's Evidence in this Action is first to show, that he had a right of common: that is proved by calling old Witnesses, who know the Plaintiff's land and the common, and that, as long as they can remember, the occupiers or owners of Plaintiff's land have had and used the common; and they must also prove in what way it was used, which must be correspondent with the Pleadings. He must then prove the injury done by the Defendant, or his cattle, also by Witnesses, which finishes his case. (d)

It is to be taken as a general Rule, that every right claimed by prescription, as for *Toll for Fairs or Markets*, *Toll for grinding at a Mill*, or for passage-money over an ancient *Ferry*, and for a *watercourse*, is proved in the same way by old Witnesses, who remember the toll or ferryage paid, or the watercourse flowing in a particular di-

(c) *Wright v. Bathing*, 2 East. 377.

(d) 2 Esp. Dig. N. P. 148. 9 Co. 112.

rection, as long as they can remember; and in all cases, as the Action is for withholding the Plaintiff's right he must prove the several acts of the Defendant in breach of his right.(e) Such as exposing Goods near the Market, and so fraudulently evading payment of the Toll; setting up another Fair or Market within seven miles of the Plaintiff's, or on the same day; carrying Corn to another Mill.(f) In the case of a *Watercourse*, so claimed by prescription, it is established by the Evidence similar to that just stated, and giving Evidence of the Defendant having diverted or turned the water; made pits to take off part or the like, or in any way to diminish the quantity of water which usually flowed to the Plaintiff's Premises, which is all matter of proof by witnesses.

Disturbance in the enjoyment of a *Pew in the Church* is another ground of this Action:(g)

The Plaintiff must make out his title to the Pew in the first place: for this purpose, he must either produce a *Faculty*, which is a grant of the Pew under the seal of the Bishop, and is in its production sufficient Evidence, or he must show his right to the Pew as appurtenant to an ancient messuage: for this purpose, old people should be called who know the Plaintiff's house; that it has been a dwelling house of the family as long as they can remember; and that Individuals of that family always sat in that Pew to the exclusion of all others.(h) But it has been held that such an enjoyment for thirty years would be sufficient.(i)

(e) 2 Esp. Dig. N. P. 150. 2 Taunt. 120. 1 Bos. & Pull. 400.

(f) 2 Saund. 115. Dougl. 238. (g) 2 Esp. Dig. N. P. 151.

(h) 1 Term. Rep. 428.

(i) 5 Term. Rep. 297.

The Plaintiff should also prove, that he or his predecessors had repaired the Pew, if averred in the Declaration ; but it is said not to be necessary in an Action against a Stranger, though, if against the Ordinary, it is necessary. *(k)*

All this is matter of parol Evidence, which the Plaintiff must bring forward at the Trial, as well as proof of the acts of disturbance done by the Defendant.

13. The infringement of an *Author's Copyright* forms another ground of this Action. *(l)*

In this case, the only Evidence required for the Plaintiff, is the proof that he is the Author of the Book or Work in question, which may be done by producing it, and calling a witness who knows it, or by the Printer who received the copy from him. He should then produce the Work or Book published by the Defendant, and prove that he published it, which may be done by a witness who bought it at Defendant's house ; and then, by comparing one Book with another, the Piracy will appear ; thirdly, he should prove the Injury from the Sale of the Defendant's Book.

The Evidence for the *Defendant* must, however, be attended to. He may show,—1. That the Book published by him is essentially different from the Plaintiff's, though the subject is the same, by pointing out the additions or amendments made by him : this is done by collating the two Books, and pointing out the passages ; that

(k) 1 Wils. 326.

(l) 2 Esp. Dig. N. P. 141.

reduces the matter to a question for the Jury to say whether the Books are the same, or different.—2. He may show that the time given by the Statute of Copyright to the Author is expired. That may be proved either by the Persons who printed the first edition of the Plaintiff's Work, or by others who know when it first came out : the time of the printing of the Defendant's Work or Book will appear by the title page.(m)

14. Of a similar description is this Action, when brought for *infringing a Patent*.

The Plaintiff, in this Action, must first produce the Patent, which, being under the great Seal, proves itself. The invention whether mechanical or manufacture, for which the Patent is granted, should be produced in a perfect state, and be proved to have been made according to the specification. Then that which has been manufactured by the Defendant of the same kind must be produced, and be proved to have been purchased from, or obtained from the Defendant. It should then be pointed out to the Jury, by the Plaintiff's witnesses, that the two things produced are precisely alike, and in what respect, in particular, the Defendant has adopted that for which the Plaintiff had the Patent. This is proof by witnesses, as well as the damages usually laid in the Declaration in the loss of the sale of the article by the Plaintiff.(n)

This is all that is required for the Plaintiff to prove at the Trial. The Defendant's Evidence is more extensive.

(m) 7 Term. Rep. 509. 1 East. 358. 1 Campb. 94. 4 Esp. N. P. C. 168.

(n) 2 Esp. Dig. N. P. 156.

He may first show that the Invention for which the Plaintiff has obtained the Patent is not original.(o) This is done by producing something of the same sort for which the Patent is granted ; and proving by Witnesses, that they had either made, or manufactured, or purchased the same, before the date of the Patent, from other Persons. By this Evidence it must accurately be established that the subject of the Patent, and that made by Defendant, appear to be the same, on which occasion the Plaintiff may point out the difference.

The Defendant, 2dly, may show any defect in the Patent or Specification : and if he does so, the Plaintiff cannot recover : as, he may show that the Patent was for a whole work, whereas what the Plaintiff has done was an addition *only*, and for which only he should have had a Patent.(p) That the specification was so obscure or inaccurate, that that for which the Patent was granted could not be made by it, or required something else to be used, not mentioned in the Patent, in order to produce it.(q)

3dly, The Defendant may show that the Plaintiff was not the Inventor, but that another Person was : but it should appear, in that case, that that Person lived in England ; for a Patent may be good though granted for something done beyond sea before,(r) but which had been brought into this country by the Plaintiff.

Lastly, The Defendant may show that the specification was not enrolled within the time required :(s) all these are

(o) 2 Salk. 447.

(p) Bull. N. P. 76.

(q) Bull. N. P. 78. 1 Term Rep. 602.

(r) Salk. 447.

(s) 2 Campb. 294.

cases of *vivá voce* proof referring to the Patent and specification.

14. If the Action is for disturbing a Person in the enjoyment of *an office* with *fees* annexed.(t)

The Plaintiff must first show that he was appointed to the Office by the Person in whom the right of nomination was; he must next show that there are certain legal and regular Fees belonging to it, and that the office is of a permanent nature : (u) If the fees claimed are what are merely given as gratuities, that will not support an action : he must, lastly, prove the amount of them and the taking of them by the Defendant to his injury for a certain time. The appointment to the office may be by parol or grant ; if the former, it must be proved by a Witness : if the latter, by production of the the Deed. The other matters are proved by Witnesses.

These are the most important heads of this Action : as they apply to the things for an injury to which the Action is brought, it remains only to consider such as have a reference to the *Person*.

These are : as the Plaintiff stands in the relation of a Father, a Husband, or a Master.

1. This Action lies at the suit of the *Father* for *Seduction* of his daughter. It is, in form, considered as maintainable for the mere loss of the service of his daughter ;

(t) 2 Esp. Dig. N. P. 152. (u) 2 Vent. 171. Cro. El. 859.

but it has been ruled, that the Plaintiff may go into Evidence of the loss of comfort in the affections of his child, and the injury to his feelings.(x)

This case is usually proved, by the Plaintiff's daughter who has been seduced; proving her relationship to the Plaintiff; her doing the household offices and duties for him; her Seduction, with the circumstances of misconduct and dishonour of Defendant, such as seducing her by promise of marriage; and if the Plaintiff has been put to the expense of her lying in, or otherwise, and it is laid in the Declaration, it should be proved.

It is indispensable for the Plaintiff to prove; that, at the time the seduction took place, his daughter made part of his family, or occasionally at least assisted in the domestic business of it; for if she was out at service, or had otherwise separated herself entirely from her Father's family, no Action in that case will lie at his suit.(y)

2. This Action will lie for the excessive beating, or ill treating, the Plaintiff's son or daughter, with a *per quod servitium amisit*,(z) The facts are proved in the same way as in the case of Seduction.

2. This Action, in which the Plaintiff sues in the character of a *Husband*,(a) with respect to Adultery, has been treated of before. The Action here to be applied to, is, first, where the Wife has been induced to live away from her Husband by the persuasion of the Defendant, who

(u) 2 Esp. Dig. N. P. C. 155. 3, Esp. N. P. C. 119.

(y) 5 East. 45.

(z) 1 Esp. N. P. C. 217.

(a) 2 Esp. Dig. N. P. 152.

has harboured her after notice, and after a request that she would return.

In this Action, the Plaintiff must prove his marriage in the way before-mentioned ; then, that he and his Wife lived happily together, and that he treated her properly, so that there was no pretence for her quitting his house on account of ill treatment. He must then show, that she was living at the Defendant's, and that he had given notice to him of her improper departure, and required him not to harbour her : this notice it is advisable to give in writing before bringing the Action, and to prove a copy of it at the Trial. The Plaintiff may then give in Evidence, the degree of comfort which he antecedently enjoyed with his Wife ; and the necessity for her attention to his domestic concerns and to his children, if he has any. (b)

An Action on the case also lies at the suit of the Husband for a battery of, or injury done to, his Wife, by means whereof she is prevented from attending to her domestic concerns ; in this case, her marriage should regularly be proved ; the injury which she received from the Defendant be proved by a witness, and the inconvenience and discomfort sustained by the Plaintiff from her confinement and illness ; and if he has been put to any expense for medical assistance, or in procuring a person to attend to his Family, he may give that in Evidence if laid in the Declaration.

3. In the character of a *Master*, the Plaintiff may also

sustain this Action, for seducing away and harbouring his Servant or Apprentice, or for retaining the former in his service, when required to discharge him : or for harbouring his Apprentice.(c)

In such Action, the Plaintiff must prove, that the Person was his Servant, and known to be so by the Defendant ; that the time of his service was not ended, nor had the Plaintiff discharged him : that the Defendant with such knowledge, took him into his service : when this has been done, it is not absolutely necessary for the Plaintiff to require the Defendant to give him up, before Action brought, but it is adviseable to do so.

But where the Defendant had hired a Servant of the Plaintiff's, not knowing him at the time to be so, no Action will lie until after notice given to him by the Plaintiff that he is so, and a requisition made by him that he should discharge such Servant from his employment. This notice and requisition are best made in writing, and served on the Defendant before Action brought, and a copy of them proved to have been served on him, by a witness at the Trial.

If the Plaintiff has suffered any loss by the absence of the Servant, as, *ex. gr.* if his work have been delayed. This, if laid in the Declaration, the Plaintiff should prove by *vivâ voce* Evidence.

If the Action is for seducing or harbouring the Plaintiff's Apprentice, he must prove the Indenture of Apprenticeship by the subscribing witness, and then the

(c) 2 Esp. Dig. N. P. 154. 2 Saund. 169.

same steps as to the notice, requisition, &c., as before-mentioned in the case of a Servant; and, in either case, it is no excuse for the Defendant, that the Servant or Apprentice refused to return, or that the Servant was a Journeyman working by the Piece; the Defendant is bound to send them away.(d)

The only matter, it should seem, which the Defendant can give in Evidence is, that the Servant was bound to serve his Master under a penalty, which the Master sued for, and enforced the payment of it; for then the right of service is at an end.(e)

2. If a Person beats the Servant of another, so as to disable him from working for his Master, the Master on proving that he was his Servant, and the injury to have been done to him by the Defendant, and the loss he has sustained from the want of his service, may recover damages, to the amount of it, in this Action of Trespass on the Case.(f)

(d) 5 Term. Rep. 221. Cowp. 54.

(e) 3 Burr. 1345. 2 Black. Rep. 387. (f) 1 Roll. Ab. 88.

THE END.

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1. The subject of this report is the
 2. investigation of the activities of the
 3. various groups and individuals who are
 4. active in the field of the study of
 5. the history of the United States.
 6. The purpose of this report is to
 7. provide a comprehensive survey of the
 8. current state of knowledge in this
 9. field, and to identify the areas in
 10. which further research is needed.

